17-549

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1043.

THE CITY OF QUINCY, PLAINTIFF IN ERROR,

vs.

MARY COOKE, EXECUTRIX OF LYMAN COOKE, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 11, 1882.

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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court of the United States for the southern district of Illinois, before you, between Mary Cooke, executrix of the last will and testament of Lyman Cooke, deceased, plaintiff, and the City of Quincy (in the State of Illinois), defendant, a manifest error hath happened to the great damage of the said defendant, the City of Quincy, as by its complaint appears:

We, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceed-

2 ings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield, in said district, this 18th day of August, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh year.

[SEAL.] J. A. JONES,
Clerk U. S. Cir. Court South. Dist. of Ills.

(Indorsed:) Supreme Court of the United States. City of Quincy, plaintiff in error, vs. Mary Cooke, executrix, &c. Writ of error. Filed August 18th, 1882. J. A. Jones, clerk.

3 *Placita.*

Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield in said district, before the Hon. John M. Harlan, one of the associate justices of the Supreme Court of the United States, presiding judge, and the Hon. Samuel H. Treat, district judge of said district and associate judge of said circuit court, on Tuesday, the 20th day of June, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and sixth year.

J. A. JONES, *Clerk.*

MARY COOKE, EXECUTRIX OF LAST WILL AND testament of Lyman Cooke, deceased,
vs.
CITY OF QUINCY.
} 5994. Assumpsit.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

4 Lyman Cooke, late a citizen and resident of the State of New York (now deceased), plaintiff in this suit, put in his place Messrs. Marsh and McFadden, his attorneys, against the City of Quincy, a municipal corporation of and in the State of Illinois, and located in the district aforesaid, in a plea of trespass on the case on promises.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 8th day of September, in the year of our Lord one thousand eight hundred and eighty, came the plaintiff, by his attorneys, and filed in the office of the clerk of said court his bond for costs in said cause, and which said bond is in the words and figures following, to wit:

Cost bond.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for said district, of the January term, 1881.

LYMAN COOKE.
vs.
CITY OF QUINCY.
} Assumpsit.

5 We enter ourselves security for all costs which may accrue in the above cause.

Dated this 7th day of September, 1880.

MARSH & McFADDEN.

(Endorsed:) Filed Sept. 8, 1880. J. A. Jones, clerk.

And afterwards, to wit, on the 9th day of September, in the year last aforesaid, there was issued out of said clerk's office a summona in said cause, directed to the marshal of said district to execute, and which summons with the return of said marshal thereto are in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, southern district of Illinois, ss.

The United States of America to the marshal of the southern district of Illinois, greeting:

We command you to summon the City of Quincy, if found in your dis-

trict, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois on the first day of the
6 next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of January next, to answer unto Lyman Cooke of a plea of trespass on the case on promises, to his damages, as he alleges, of twelve hundred dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this ninth day of September, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fifth year.

[L. S.] J. A. JONES, *Clerk.*

Marshal's return.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I have served the within summons by reading the same to and also leaving a copy of the same with J. K. Webster, the duly elected and qualified mayor of the said city of Quincy, this eleventh day of September, A. D. 1880.

JACOB WHEELER,
U. S. Marshal,
Per EUGENE R. COX,
Deputy.

(Endorsed:) Filed September 13, A. D. 1880. J. A. Jones, clerk.

7 And afterwards, to wit, on the 24th day of December, in the year last aforesaid (1880), came the said plaintiff, by his attorneys, and filed in said clerk's office his declaration in said cause, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Southern District of the State of Illinois, ss:

In the circuit court of the United States for the southern district of Illinois, to January term, A. D. 1881.

Lyman Cooke, who is a citizen of the State of New York, plaintiff, complains of the City of Quincy, a municipal corporation of and in said southern district of the State of Illinois, defendant, in a plea of trespass on the case on promises:

1. For that whereas the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 7, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and
8 of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy,

Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond at or after the date when they respectively become due, and to which bond, contemporaneously with the making, the same interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided as the same matured and
9 became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond when and as aforesaid the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1879, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and being so liable, the said defendant in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay
10 him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

2d. And whereas, also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 7, on the face of which is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable
11 annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed,

whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, to wit, on the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond when as aforesaid the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1880, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of
12 said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and being so liable, the said defendant, in consideration thereof, afterwards, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

3d. And whereas, also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 12, on the face of which it is recited as follows, to wit: "This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved
13 March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Railroad Company, or bearer, at the National Bank of Commerce, in *in* the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons saiddefendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond when and as aforesaid the said defendant promised to pay the bearer thereof, as and for one year's interest on said
14 bond, on the first day of January, A. D. 1879, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the

time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof; and being so liable the said defendant in consideration thereof afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money, in said last-mentioned coupon specified, according to the tenor and effect thereof.

4th. And whereas also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 12, on the face of which it is recited as follows, to wit: "This bond is issued
15 under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date, at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay bearer the several installments of interest in said bond provided, as the same matured and became payable by the tenor and effect there-
16 of, and which said bond and annexed coupons said defendant afterwards, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond, when and as aforesaid, the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1880, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars; and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof; and being so liable the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to
17 pay him said sum of money, in said last-mentioned coupon specified, according to the tenor and effect thereof.

5th. And whereas also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due au-

thority of law made its certain bond of that date numbered 19, on the face of which is recited as follows, to wit: "This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and de-
18 livery, at the said national bank, of the coupons of interest attached to said bond, at or after the date when they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest on said bonds provided as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond, when and as aforesaid the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1879, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of
19 said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof; and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff, to pay him said sum of money, in said last-mentioned coupon specified, according to the tenor and effect thereof.

6th. And whereas, also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 19, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 4, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in sub-
20 scribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars,

with interest from said last-mentioned date, at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank, of the coupons of interest attached to said bond, at or after the date when they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided, as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

21 And the said plaintiff avers that by one of the said interest coupons annexed to said bond, when and as aforesaid, the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1880, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became, and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was and still is the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and being so liable the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

7th. And whereas, also, the said defendant, heretofore, to wit,

22 on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 34, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois entitled, 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date, at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when

23 they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided, as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company. And the said plaintiff avers that by one of the said interest coupons annexed to said bond, when, and as afore-

said, the said defendant promised to pay the bearer thereof as and for one year's interest on said bond, on the first day of January, A. D. 1879, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase, said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to
24 said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

8th. And whereas, also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 34, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869;" and by
25 which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date, at the rate of six per cent. per annum, payable annually upon the presentation and at the said national bank of the coupons of interest attached to said bond at or after the date when they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond, when and as aforesaid the said defendant promised to pay the bearer thereof as and for one year's interest on said bond, on the
26 first day of January, A. D. 1880, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and, being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last

aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

9th. And whereas, also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 35, on the face of which it is recited as follows, to wit: "This bond is issued
27 under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond at or after the date when they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided as the same matured and became payable by the tenor and effect thereof,
28 and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the interest coupons annexed to said bond, when, and as aforesaid, the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1879, at the National Bank of Commerce in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and, being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him
29 said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

10th. And whereas, also, the said defendant heretofore, to wit, *to wit*, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 35, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled, 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the

capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date, at the rate of six per cent. per annum,
30 payable annually upon presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively became due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided, as the same matured and became payable *payable* by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond, when, and as aforesaid, the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1880, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of
31 the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By whereof the said defendant became liable to pay to said plaintiff said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

11th. And whereas, also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 69, on the face of which it is recited as follows, to wit: "This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, 'An act to legalize the acts of the city council of
32 the city of Quincy, Illinois, in subscribing to the capital stock of the Msisissippi and Missouri River Air Line Railroad Company,' approved March 27, 1869;" and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively become due; and to which bond, contemporaneously with the making the same, interest coupons were annexed whereby the said defendant prom-

ised to pay to bearer the several installments of interest in said bond provided, as the same matured and became payable by the tenor and effect thereof; and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

33 And the said plaintiff avers that by one of the said interest coupons annexed to said bond, when, and as aforesaid, the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1879, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon; by reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof, and being so liable the said defendant in consideration thereof afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

12th. And whereas, also, the said defendant heretofore, to wit,

34 on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 69, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually, upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond at or after the date when

35 they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond when and as aforesaid the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1880, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of

the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to
36 said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

13th. And whereas, also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 70, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the
37 said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively become due; to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupon said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the plaintiff avers that by one of the said interest coupons annexed to said bond when and as aforesaid the said defendant promised to
38 pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1879, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

14th. And whereas, also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by

39 due authority of law, made its certain bond of that date, numbered 70, on the face of which it is recited as follows, to wit: "This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively become due, and to which bond, contemporaneously with the
40 making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond when and as aforesaid the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1880, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said
41 plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

15th. And whereas, also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 72, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to
42 the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New

York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond, when and as aforesaid, the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1879, at the National Bank of Com-
43 merce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof; and being so liable the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

And whereas also the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 72, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an
44 act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several instalments of interest in said bond provided, as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, to wit, the day and year last aforesaid, delivered to said company.

45 And the said plaintiff avers that by one of the said interest coupons annexed to said bond, when and as aforesaid, the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1880, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became, and is detached from said bond, and that by purchase said plaintiff became and at the institution of this suit was and still is the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof; and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

46 And whereas also the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date numbered 73, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the

47 said defendant promised to pay to bearer the several installments of interest in said bond provided, as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond, when and as aforesaid, the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1879, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, ac-

cording to the tenor and effect thereof, and being so liable the said
48 defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

And whereas also the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid by due authority of law, made its certain bond of that date, numbered 73, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said
49 last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided, as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond, when and as aforesaid the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1880, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached
50 from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof; and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

And whereas also the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 74, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city coun-

cil of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in sub-
51 scribing to the capital stock of the Mississippi and Missouri River Air-Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery, at the national bank, of the coupons of interest attached to said bond, at or after the date when they respectively became due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the defendant promised to pay to bearer the several installments of interest in said bond provided, as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid delivered to said company.

52 And the said plaintiff avers that by one of the said interest coupons annexed to said bond, when and as aforesaid, the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1879, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof; and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

And whereas also the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid,
53 by due authority of law, made its certain bond of that date, numbered 74, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869;" and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon presentation and delivery at the said national bank of the coupons

of interest attached to said bond at or after the date when they respectively become due, and to which bond, contemporaneously with the mak-
54 ing the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided, as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond when, and as aforesaid, the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1880, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified,
55 according to the tenor and effect thereof; and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

And whereas also the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 75, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promise to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer,
56 at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively become due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided, as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond when and as aforesaid the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on

the first day of January, A. D. 1879, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of
57 thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

And whereas, also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 75, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legal-
58 ize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date, at the rate of 6 per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively become due, and to which, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay to bearer the several installments of interest in said bond provided as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

59 And the said plaintiff avers that by one of the said interest coupons annexed to said bond when and as aforesaid the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1880, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay to said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said

sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

60 And whereas, also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 76, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of

61 the coupons of interest attached to said bond, at or after the date when they respectively become due, and to which bond contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay bearer the several installments of interest in said bond provided as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendant afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond when and as aforesaid the said defendant promised to pay the bearer thereof, as and for one year's interest on said bond, on the first day of January, A. D. 1879, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last mentioned coupon.

By reason whereof the said defendant became liable to pay to

62 said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

And whereas, also, the said defendant heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the district aforesaid, by due authority of law, made its certain bond of that date, numbered 76, on the face of which it is recited as follows, to wit:

"This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad

Company,' approved March 27, 1869," and by which bond the said defendant promised to pay, thirty years after the said date thereof, to
63 the Mississippi and Missouri River Air Line Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of five hundred dollars, with interest from said last-mentioned date at the rate of six per cent. per annum, payable annually upon the presentation and delivery at the said national bank of the coupons of interest attached to said bond, at or after the date when they respectively became due, and to which bond, contemporaneously with the making the same, interest coupons were annexed, whereby the said defendant promised to pay the bearer the several installments of interest in said bond provided as the same matured and became payable by the tenor and effect thereof, and which said bond and annexed coupons said defendants afterwards, on, to wit, the day and year last aforesaid, delivered to said company.

And the said plaintiff avers that by one of the said interest coupons annexed to said bond when and as aforesaid the said defendant promised to pay the bearer thereof, as *as* and for one year's interest on said bond, on the first day of January, A. D. 1880, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of
64 thirty dollars, and that said last-mentioned coupon became and is detached from said bond, and that by purchase said plaintiff became, and at the time of the institution of this suit was, and still is, the bearer and owner of said last-mentioned coupon.

By reason whereof the said defendant became liable to pay said plaintiff the said sum of money in said last-named coupon specified, according to the tenor and effect thereof, and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the day and year last aforesaid, at. to wit, the district aforesaid, promised said plaintiff to pay him said sum of money in said last-mentioned coupon specified, according to the tenor and effect thereof.

And whereas, also, the said defendant heretofore, to wit, on the first day of September, A. D. 1880, at, to wit, the district aforesaid, was indebted to said plaintiff in the sum of twelve hundred dollars for money lent and advanced by said plaintiff to said defendant at its request;

And in the sum of twelve hundred dollars for money then & there had and received by said defendant to & for the use of said plaintiff;
65 And in the sum of twelve hundred dollars for money then and there paid, laid out, and expended by said plaintiff to and for the use of said defendant and at its request;

And in the sum of twelve hundred dollars for money then and there found to be due and owing by said defendant to said plaintiff upon an account then and there stated between them;

And in the sum of five hundred dollars for interest upon and for the forbearance and use of divers large sums of money before then due and owing by said defendant to said plaintiff, and by the plaintiff forborne to the defendant at its request for divers long spaces of time before then elapsed;

And being so indebted, the said defendant then and there, in consideration thereof, promised to pay to said plaintiff the said several last-mentioned sums of money upon request;

Yet the said defendant, although often requested so to do, has not paid to said plaintiff the said several sums of money in the foregoing counts of this declaration mentioned, nor either of them, nor any part thereof, but to pay the same to said plaintiff the said defendant has hitherto wholly refused, and still refuses, to the plaintiff's damage the sum of twelve hundred dollars, and therefore he brings suit, &c.

MARSH & McFADEN,
Pl'ff's Att'ys.

66 *Copies of the interest coupons sued on in this cause.*

City of Quincy, Illinois. Coupon to bond No. 12. Mississippi and Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1879, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

B. F. BERRIAN, *Mayor.*

T. J. HEIRS, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 12. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1880, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

B. F. BERRIAN, *Mayor.*

T. J. HEIRS, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 19. Mississippi & Missouri River Air Line Railroad.

67 The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1879, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

B. F. BERRIAN, *Mayor.*

T. J. HEIRS, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 19. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1880, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

B. F. BERRIAN, *Mayor.*

T. J. HEIRS, *Clerk.*

City of Quincy, Illinois. Coupon bond No. 34. Mississippi and Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1879, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

B. F. BERRIAN, *Mayor.*

T. J. HEIRS, *Clerk.*

68 City of Quincy, Illinois. Coupon to bond No. 34. Mississipp & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1880, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

B. F. BERRIAN, *Mayor.*

T. J. HEIRS, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 35. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1879, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

B. F. BERRIAN, *Mayor.*

T. J. HEIRS, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 35. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1880, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

B. F. BARIAN, *Mayor.*

T. J. HAIR, *Clerk.*

69 City of Quincy, Illinois. Coupon to bond No. 7 . Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1879, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

B. F. BERRIAN, *Mayor.*

T. J. HEIRS, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 7. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1880, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

B. F. BERRIAN, *Mayor.*

T. J. HEIRS, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 69. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1879, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

J. G. ROWLAND, *Mayor.*

JOHN H. AYRES, *Clerk.*

70 City of Quincy, Illinois. Coupon to bond No. 69. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1880, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

J. G. ROWLAND, *Mayor.*

JOHN H. AYRES, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 70. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1879, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

J. G. ROWLAND, *Mayor.*

JOHN H. AYRES, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 70. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1880, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

J. G. ROWLAND, *Mayor.*

JOHN H. AYRES, *Clerk.*

71 City of Quincy, Illinois. Coupon to bond No. 72. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1879, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

J. G. ROWLAND, *Mayor.*

JOHN H. AYRES, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 72. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1880, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

J. G. ROWLAND, *Mayor.*

JOHN H. AYRES, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 73. Mississippi & Missouri River Air Line Railroad.

The city of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1879, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city, numbered as above.

J. G. ROWLAND, *Mayor.*

JOHN H. AYRES, *Clerk.*

72 City of Quincy, Illinois. Coupon to bond No. 73. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1880, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

J. G. ROWLAND, *Mayor.*

JOHN H. AYRES, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 74. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1879, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

J. G. ROWLAND, *Mayor.*

JOHN A. AYRES, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 74. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1880, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

J. G. ROWLAND, *Mayor.*

JOHN H. AYRES, *Clerk.*

73 City of Quincy, Illinois. Coupon to bond No. 75. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1879, at the National Bank of Commerce, in the city of New York, in the State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

J. G. ROWLAND, *Mayor.*

JOHN H. AYERS, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 75. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1880, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, being one year's interest on the bond of said city numbered as above.

J. G. ROWLAND, *Mayor.*

JOHN H. AYERES, *Clerk.*

City of Quincy, Illinois. Coupon to bond No. 76. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1879, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

J. G. ROWLAND, *Mayor.*

JOHN H. AYERS, *Clerk.*

74 City of Quincy, Illinois. Coupon to bond No. 76. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to the bearer hereof, on the 1st day of January, 1880, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

J. G. ROLAND, *Mayor.*

JOHN H. AYERS, *Clerk.*

MARSH & McFADEN,
Plaintiff's Attorneys.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the circuit court of the United States for the southern district of Illinois, to the January term, A. D. 1881.

LYMAN COOKE
vs.
CITY OF QUINCY.

STATE OF ILLINOIS,
Adams County:

William Marsh, being first duly sworn, deposes and says that he
75 is one of the attorneys of the plaintiff in the above-entitled cause, and has personal knowledge of the nature of the plaintiff's demand in said cause; that the demand of the plaintiff in said cause is for money due and owing by said defendants to said plaintiff for and upon interest coupons made and issued by said defendant, and now, and at the time of the commencement of this suit, held and owned by said plaintiff, said coupons representing the interest accrued and due upon certain bonds made and issued by said defendants, and now, and at the time of the commencement of this suit, held and owned by said plaintiff, and that said bonds and coupons are in the possession and control of this deponent, as attorney for said plaintiff, and that true and correct copies of said coupons are attached to and filed with the plaintiff's declaration in this cause, and that the amount due from the defendant to the plaintiff in this cause upon said interest coupon on the day of the date of this affidavit, after allowing to the defendant all its just credits, deductions, and set-offs, in the sum of seven hundred and eighty-seven $\frac{32}{100}$ dollars.

WM. MARSH.

Subscribed and sworn to before me this 22nd day of December, A. D. 1880.

Witness my hand and notarial seal, at Quincy, in said county of Adams.

[SEAL.] CHESTER A. BABCOCK,
Notary Public, Adams County, Illinois.

76 (Endorsed:) Filed Dec. 24, 1880. J. A. Jones, clerk.

And afterwards, to wit, on Tuesday, the 4th day of January, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-one, the following proceedings were had in said court in said cause and entered of record, to wit:

Order allowing def't time to plead.

LYMAN COOKE
vs. 5994. Assumpsit.
CITY OF QUINCY.

On motion of defendant, by Messrs Stuart, Edwards and Brown, its attorneys, leave is granted to plead by Wednesday, the 12th day of January, inst.

And afterwards, to wit, on the 12th day of January, in the year last aforesaid, came the defendant, by its attorneys, and filed in said clerk's office its plea in said cause, which is in the words and figures following, to wit:

77 *Plea.*

UNITED STATES OF AMERICA,
State of Illinois, ss:

In the United States circuit court for the southern district of Illinois.

CITY OF QUINCY
ats.
LYMAN COOK. } In assumpsit.

And the said defendant, The City of Quincy, by James E. Purnell, Stuart, Edwards & Brown, its attorneys, comes and defends the wrong and injury, when, etc., and says that it did not undertake and promise in manner and form as the said plaintiff hath above thereof complained against it. And of this it puts itself upon the country, etc.

JAMES E. PURNELL,
STUART, EDWARDS & BROWN,
Att'ys for Def't.

And said plaintiff doth the like.

MARSH & McFADDEN,
Pl'ff's Att'ys.

STATE OF ILLINOIS,
Adams County, ss:

In the United States circuit court, southern district of Illinois, to the January term, A. D. 1881.

78 LYMAN COOK
vs.
THE CITY OF QUINCY. } In assumpsit.

John K. Webster, first being duly sworn, upon his oath states and says that he is the mayor of the City of Quincy, the above-named defendant, and as such mayor and agent of said above-named defendant, says that he verily believes that said defendant, the City of Quincy, has a good defence to said above entitled suit, upon the merits of the plaintiff's demand.

JOHN K. WEBSTER, *Mayor.*

Subscribed and sworn to before me this 29th December, A. D. 1880.
[L. S.] FRANKLIN M. McCANN,
Notary Public.

(Endorsed:) Filed January 12, 1881. J. A. Jones, clerk.

And afterwards, to wit, on Saturday, the 15th day of January, at the January term of said court, in the year last aforesaid, the following

79 further proceedings were had in said court in said cause and entered of record, to wit:

Order setting cause for hearing.

LYMAN COOKE
vs.
CITY OF QUINCY. } Assumpsit.

By consent of parties, by their attorney, this cause is set for Monday, the 7th day of March next.

And afterwards, to wit, on Monday, the 7th day of March, at the January term of said court, in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Trial.

LYMAN COOKE
vs.
CITY OF QUINCY. } 5994. Assumpsit.

This day comes as well the plaintiff, by Messrs. Mearsh and McFadden, his attorneys, as the defendant by James E. Purnell and Messrs. Stuart, Edwards and Brown, its attorneys, and issue being joined, whereupon comes a jury of good and lawful men, to wit, Charles L. Ricketts,
80 Edward R. Roe, James W. Robb, R. P. Johnston, J. M. Lockridge, John H. Johnson, Alexander W. Reynolds, James Wilson, John R. Herndon, Alexander Lancaster, Thomas D. Foulke, and Abner S. Gray, duly elected, tried, and sworn to try said issue, and having heard the evidence in part, the further trial of this cause is postponed until tomorrow morning.

And afterwards, to wit, on Tuesday, the 8th day of March, at the term of said court and in the year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Verdict of jury & judgment for plaintiff.

LYMAN COOKE
vs.
CITY OF QUINCY. } 5994. Assumpsit.

This day come again the parties by their attorneys, and also the jury impannelled and sworn herein, who having heard the remainder of the evidence, argument of counsel, and received the instructions of the court, for verdict say:
81 "We, the jury, find the issue for the plaintiff, and assess his damages to the sum of seven hundred and ninety-two dollars and seventy-two cents."
It is therefore ordered and adjudged by the court that the plaintiff re-

cover of the defendant the said sum of seven hundred and ninety-two and seventy-two cents, his damages aforesaid assessed, together with the sum of ninety-five dollars and eighty-nine cents, his costs and charges by him about his suit in this behalf expended, and that execution issue therefor.

And afterwards, to wit, on Wednesday, the 9th day of March, at the term of said court and in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record to wit:

Order setting motion for new trial for a full bench.

LYMAN COOKE
vs.
CITY OF QUINCY. } Assumpsit.

This day comes the defendant, by Messrs. Stuart, Edwards and Brown, its attorneys, and enters its motion for a new trial herein, which is
82 continued for hearing before a full bench.

And afterwards, to wit, on Monday, the 19th day of June, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-two, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order upon suggestion of death of plaintiff.

LYMAN COOKE
vs.
CITY OF QUINCY. } 5994. Assumpsit.

And now, on this 19th day of June, 1882, come Marsh and McFadden, counsel for plaintiff, and suggest his death, and on their motion it is ordered by the court that Mary Cooke, executrix of the last will and testament of Lyman Cooke, be made plaintiff in his stead.

And afterwards, to wit, on Tuesday, the 20th day of June, at the term of said court and in the year last aforesaid, the following further
83 proceedings were had in said court in said cause and entered of record, to wit:

Order sustaining motion for new trial.

MARY COOKE, EXECUTRIX OF LAST WILL AND testament of Lyman Cooke, dec'd,
vs.
CITY OF QUINCY. } 5994. Assumpsit.

This day this cause came on to be heard upon motion of defendant for a new trial herein, and the court having heard argument of counsel sustains said motion.

Finding and final judgment for plaintiff.

MARY COOKE, EXECUTRIX OF LAST WILL AND testament of Lyman Cooke, deceased,
vs.
CITY OF QUINCY. } 5994. Assumpsit.

This day comes as well the plaintiff, by Messrs. Marsh and McFadden her attorneys, as the defendant, by Carl E. Epler, esq., and Messrs. Stuart Edwards, and Brown, its attorneys, and the issue joined, by consent is tried by the court, a jury being waived, and the court having heard the
84 evidence and argument of counsel, finds the issue for the plaintiff, and assesses her damages to the sum of eight hundred and forty-eight dollars and twenty-eight cents.

It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the said sum of eight hundred and forty-eight dollars and twenty-eight cents, her damages aforesaid assessed, together with the sum of ninety-five dollars and eighty-nine cents, her costs and charges by her about her suit in this behalf expended, and that execution issue therefor.

And it further appearing to the court that upon the trial of this cause the circuit justice and district judge were divided in opinion as to certain questions of law occurring thereon, it is thereupon further ordered by the court that special findings of the facts upon which such division of opinion arose herein be filed, and made part of the record in this case, and that upon the defendant filing bond in the sum of $500, conditioned as required by law, and the special findings aforesaid, within sixty days from this date, that a complete transcript of the record be certified to the Supreme
85 Court of the United States, according to the statute in such case made and provided, and that said bond operate as a supersedeas.

And on the same day (June 20th, 1882), the following special findings and certificate of division, signed by the judges holding said court, were filed in said clerk's office and made part of the record in said cause, to wit:

Special findings of the court.

MARY COOKE, EXECUTRIX OF LAST WILL AND testament of Lyman Cooke, dec'd,
vs.
CITY OF QUINCY. } 5994. Assumpsit.

This cause having by agreement in writing between the parties duly filed been submitted to the court for trial without the intervention of a jury, the court finds the following facts:

1st. That the City of Quincy, the defendant herein, was incorporated as a city in the year 1840 by the legislature of Illinois, since which year it has ever been a city and municipal corporation of the State of Illi-
86 nois; that said city, since the date of its said incorporation, has always had a special charter of its own, and has never been incorporated under any general law of said State; that at the time of the holding of the election hereinafter mentioned, and at all times thereafter down

to the commencement of this suit, a law approved and in force February 16th, 1857, was in force and effect as a part of the charter of the defendant, which said act was in the words and figures following, to wit:

1. *Act of legislature allowing city of Quincy to issue bonds.*

An act supplemental to an act entitled an act to reduce the law incorporating the City of Quincy and the several acts amendatory thereof into one act, and to amend the same.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, that the city council of the city of Quincy, Illinois, be, and is hereby, authorized and empowered (anything contained in the act to which this is a supplement notwithstanding) to issue city bonds to any amount not exceeding, at one time, in the aggregate, the sum of seventy-five thousand dollars, and not bearing a rate of interest higher than eight per cent. per annum, the interest to be paid annually or
87 semi-annually, at the option of the said city council.

SECTION 2. This act shall be deemed a public act, and be in force from and after its passage.

That by another provision of its charter the city council of said city, at the time of the holding of the election hereinafter mentioned, and at all times since then, had power "to appropriate money and provide for the payment of the debt and expenses of said city."

2d. And the court further finds that the city council of said defendant, at a meeting of that body, held June 9th, 1868, without the existence of any law athorizing or requiring the election therein mentioned, passed a resolution in the words and figures following, to wit:

2. *Resolution of city council as to holding an election.*

Resolved, that an election be held, at the usual places of voting, in the city of Quincy, on the 27th day of June, A. D. 1868, at which time and place shall be submitted the proposition of authorizing the city of Quincy to subscribe the sum of $100,000 to aid in the construction of a railroad from West Quincy northwesterly, connecting Quincy with the Missouri Air Line Railroad, payable in bonds of said city bearing six
88 per cent. annual interest, and running thirty years, provided that such subscription shall be dependent upon the county of Lewis, in Missouri, subscribing an equal amount, and also that before payment or issue of any bonds there shall have been expended upon said road $50,000 in grading, bridging, and tieing the road, commencing at West Quincy, to a distance not exceeding twenty-five miles; and provided that due guaranties be given to the city before issuing said bonds that all proceeds of such bonds shall be expended in construction of said road from West Quincy, and within twenty-five miles thereof, the city council of Quincy to determine on the compliance with said conditions and issue of bonds in payment of subscription. The voting on the above proposition to be by ballot, and the form of vote shall be as follows: For railroad subscription; and, Against railroad subscription.

And the court further finds that, pursuant to said resolution, an election was held in said city of Quincy on June 27th, 1868, at which election 651 votes were cast for, and 198 votes against, subscription, and that the total number of votes thrown in said city at the last general election 89 previous to the election above mentioned was 1,707.

3d. And the court further finds that after said election, and on the 7th day of August, 1868, the city council of said city duly passed an ordinance as follows, to wit:

3. *Ordinance of city of Quincy directing mayor to subscribe to capital stock, &c.*

Ordinance 109.

Be it ordained by the city council of the city of Quincy that the mayor of said city be, and is hereby, empowered, authorized, and directed, in the name and in behalf of said city, to subscribe in the sum of one hundred thousand dollars to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, said subscription being made to aid in the construction of a railroad from West Quincy northwesterly, connecting Quincy with said Mississippi River and Missouri River Air Line Railroad, payable in bonds of said city, bearing six per cent. annual interest, and running thirty years. The above subscription is to be made upon the condition that before payment or issue of said bonds there shall have been expended upon said road fifty thousand dollars in grading, bridg- 90 ing, and tieing the road, commencing at West Quincy, to a distance not exceeding twenty-five miles: And provided, that due guaranties be given to the city before issuing said bonds that all proceeds of said bonds shall be expended in the construction of said road from West Quincy, and within twenty-five miles thereof, the city council of Quincy to determine on the compliance with said conditions and issue of bonds in payment of subscription.

4th. And the court further finds that said city of Quincy, by its then mayor, in pursuance of said last-named ordinance, on the 8th day of August, A. D. 1868, said ordinance being then in force, subscribed in the sum of $100,000 to the capital stock of said railroad company, said subscription being payable in bonds of said city, bearing six per cent. annual interest, and running thirty years, said subscription being made subject to the conditions in said ordinance mentioned.

5th. And the court further finds that said subscription of August 91 8th, 1868, was made without authority of law, other than that, if any, given by the charter provisions of said city above mentioned.

But the court further finds, that before any bonds were issued by said city defendants in payment of said subscription, the legislature of the State of Illinois passed a certain act which was approved and in force March 27th, 1869, and which said act is in the words and figures following, to wit:

4.—*Act of legislature legalizing acts of city council of Quincy.*

"An act to legalize the acts of the city council of the city of Quincy, Illinois, subscribing to the capital stock of the Mississippi and Missouri Air Line Railroad Company."

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, that the acts of the city council of the city of Quincy, from June 2d, A. D. 1868, to August 28th, A. D. 1868, in ordering an election on the proposition to subscribe the sum of one hundred thousand dollars to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, and the subscription to said stock, and all other acts of said council in connection therewith, are hereby legalized and confirmed.

92 SECTION 2. This bill shall be in force from and after its passage. (Private laws, Illinois, vol. iii, p. 376).

6th. And the court further finds that the said Mississippi and Missouri River Air Line Railroad Company was and is a corporation created and existing under and by virtue of the laws of the State of Missouri; that the railroad of said company lies wholly within the State of Missouri; that it has its eastern terminus at West Quincy, a town in Missouri, on the western bank of the Mississippi River, and opposite the city of Quincy, which lies on the eastern bank of said river, in Illinois; that said company owns, and has always run, since its railroad began to be built, its railroad trains from said West Quincy into and out of said city of Quincy, over the railroad bridge of the Quincy Bridge Company, which said bridge spans the Mississippi River, connecting said city of Quincy with said town of West Quincy.

7th. And the court further finds that on January 1st, 1870, the city council of said city of Quincy issued and delivered to said railroad

93 company, in part payment of the subscription aforesaid, its 50 bonds of $500 each, numbered from 1 to 50 inclusive, dated January 1st, 1870, and payable in thirty years from date, with interest at the rate of six per cent. per annum, and received of said company in exchange therefor 250 shares of stock of said company of the par value of $100 per share; that on May 18th, 1870, in further payment of said subscription, said city issued its 75 additional bonds of $500 each, numbered from 51 to 125 inclusive, of like tenor and date with the bonds first above-mentioned, and delivered them to said company, receiving in exchange therefor 375 shares of said company's stock, of the par value of $100 each; that on November 12th, 1870, in further and full payment of said subscription, said city issued and delivered to said railroad company its 75 other bonds of $500 each, numbered from 126 to 200, inclusive, and dated July 1st, 1870, but otherwise of like tenor with the bonds above-mentioned, and received in exchange therefor 375 shares of the capital stock of said company, of the par value of $100 each.

94 8th. And the court further finds that said bonds were copies of each other save as to their serial numbers and dates, and bond No. 7 is in the words and figures following, to wit:

5.—Copy of Bond of City of Quincy.

No. 7.] UNITED STATES OF AMERICA, STATE OF ILLINOIS. [$500.

City of Quincy bond.

Five hundred dollars.] [Thirty years.

Know all men by these presents, that the city of Quincy, in the State of Illinois, acknowledges itself indebted and firmly bound to the Mississippi and Missouri River Air Line Railroad Company in the sum of five hundred dollars, which sum the said city promises to pay to the said railroad company, or bearer, at the National Bank of Commerce, in the city of New York, in the State of New York, thirty years after the date hereof, together with interest thereon from the first day of January, A. D. 1870, at the rate of six per centum per annum, which said interest shall be payable annually, on the presentation and delivery at said National Bank of Commerce of the coupons of interest hereto attached, at or after the date when they shall respectively become due.

95 This bond is issued under and by virtue of an order of the city council of said city of Quincy, passed August 7th, A. D. 1868, and of an act of the general assembly of the State of Illinois, entitled "An act to legalize the acts of the city council of the city of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company," approved March 27, 1869, said railroad company having been incorporated by an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Mississippi and Missouri River Air Line Railroad Company," approved February 17, A. D. 1857, and of an act amendatory thereto, entitled "An act to extend the time for the completion of the Mississippi and Missouri River Air Line Railroad," approved March 8, 1867, and of a secondary act amendatory of said first-named act, entitled "An act to extend the Mississippi and Missouri River Air Line Railroad," approved March 23, 1868.

In testimony whereof the said city of Quincy has executed this bond, by the mayor of said city, under the order of the city council thereof, signing his name hereto, and by the clerk of said city, under the order

96 thereof, attesting the same and affixing the seal of said city.

Done at the clerk's office in the city of Quincy aforesaid this first day of January, A. D. 1870.

[CITY SEAL.]

B. F. BERRIAN,
Mayor of the City of Quincy.

Attest:

F. D. HEIRS,
Clerk of the City of Quincy.

9th. And the court further finds that the interest specified in said bond was evidenced by coupons thereto attached, and said coupons are copies of each other, except as to their serial numbers and the dates of their maturity. One of the coupons taken from bond No. 7, as aforesaid, is in the words and figures following, to wit:

6. *Copy of coupons sued on.*

City of Quincy, Illinois. Coupon to bond No. 7. Mississippi & Missouri River Air Line Railroad.

The City of Quincy, in the State of Illinois, will pay to bearer hereof, on the first day of January, 1880, at the National Bank of Commerce, in the city of New York, State of New York, the sum of thirty dollars, the same being one year's interest on the bond of said city numbered as above.

B. F. BERRIAN, *Mayor.*

T. J. HEIRS, *Clerk.*

97 10th. And the court further finds that the 25 coupons sued on, and upon which judgment is rendered in this case, bore the following numbers: 7, 12, 19, 34, 35, 69, 70, 72, 73, 74, 75, 76, there being two coupons of each of said numbers, but maturing at different dates, and one coupon numbered 133; that they were cut from bonds bearing corresponding numbers and issued as aforesaid; and that the plaintiff bought the bonds from which the coupons sued on were detached, with all the coupons thereto attached and unpaid, embracing those sued on, as a bona fide purchaser, for value, before maturity, in open market, in the usual course of business, and without notice of any defence against said bonds or coupons.

11th. And the court further finds that the said City of Quincy regularly, for six years after the issue thereof, paid the successive annual installments of interest on each of the 200 bonds, so as aforesaid issued in payment of said subscription, as they respectively came due; and that said City of Quincy appointed an agent to appear for it at one or more
98 meetings of the stockholders of said railroad company, and vote upon said $100,000 of the capital stock of said company, and said agent, so appointed, did appear at one or more meetings of said stockholders several times after July 2d, 1870, and vote for and in behalf of said city upon said capital stock last aforesaid.

Certificate of division of opinion.

And the said cause having been heard before the undersigned, John M. Harlan, circuit justice, and Samuel H. Treat, district judge, holding the said circuit court, and we, the said judges, holding said court, having found and agreed upon the foregoing facts, were opposed in opinion:

1st. As to whether the said act of March 27th, 1869, hereinbefore recited, had the effect to legalize the said election held June 27th, 1868, or the said subscription, if otherwise invalid, made August 8th, 1868.

2d. As to whether the said act by its terms, under the facts above found, created a debt against the City of Quincy without the consent of its corporate authorities.

3d. As to whether said act is or is not unconstitutional.

99 4th. As to whether the taking effect of the constitution of Illinois of 1870, on July 2d, 1870, did not do away with the power to issue the bonds which were issued in November, 1870, and render them unconstitutional and void.

5th. As to whether plaintiff was entitled to recover upon said coupon cut from bond numbered 133, without also proving performance of the conditions mentioned in said ordinance 109, passed August 7th, 1868, and in the subscription of August 8th, 1868, aforesaid.

6th. As to whether the defendant, independently of the alleged curative act of 1869, had power under the act of February 16th, 1857, aforesaid, to issue any of said bonds.

7th. Do the facts found as occurring subsequently to the issue of said bonds amount to ratification by the defendant or estop said defendant from denying the validity of said bonds?

8th. Do the recitals on the face of said bonds estop the defendant from denying the validity of said bonds?

9th. As to whether said bonds were issued for a corporate purpose.

Wherefore we certify the said facts and the said division of opinion to the Supreme Court for its determination; and the said John M. Har-
100 lan, the presiding justice, being of the opinion that upon the foregoing facts the law of the case upon all said questions is with the plaintiff, judgment is hereby entered for the plaintiff, and this certificate of division with special findings aforesaid is ordered to be entered of record.

JOHN M. HARLAN,
Circuit Justice.

S. H. TREAT,
District Judge.

(Endorsed:) Filed June 20, 1882. J. A. Jones, clerk.

And afterwards, to wit, on the 18th day of August, in the year last aforesaid, came the defendant and filed in said clerk's office its bond on writ of error in said cause, which was approved by the court, and is in the words and figures following, to wit:

Bond on writ of error.

In the circuit court of the United States, southern district of Illinois.
June term, A. D. 1882.

101 THE CITY OF QUINCY, PLAINTIFF IN error,
vs.
MARY COOKE, EXECUTRIX OF LAST WILL & TESTAMENT of Lyman Cooke, dec'd, defendant in error. } In error.

Know all men by these presents that we, the City of Quincy, D. F. Deaderick, T. M. Rogers, J. Parkhurst, H. Swimmer, Edmund Wall, E. H. Turner, J. Smith Cruttenden, and Charles W. Chumbley, are held and firmly bound unto the above-named Mary Cooke, executrix of last will and testament of Lyman Cooke, dec'd, in the sum of five hundred dollars, to be paid to the said Mary Cooke, exec'tr'x, &c., of Lyman Cooke, dec'd, her executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, successors, executors, and administrators, firmly by these presents.

In witness whereof the said City of Quincy has caused its corporate seal to be hereto affixed, and attested by the signatures of its mayor and
102 comptroller, and in witness whereof D. F. Deaderick, T. M. Rogers, J. Parkhurst, A. Swimmer, Edmund Watt, E. H. Turner, J. Smith Cruttenden, and Charles W. Chumbley have hereunto set their hands and seals as sureties. Done this twentieth day of July, A. D. 1882.

Whereas the above-named the City of Quincy hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States in and for the southern district of the State of Illinois: Now, therefore, the condition of this obligation is such that if the above-named the City of Quincy shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

D. H. DEADERICK, *Mayor.*
ALBERT DEMAREE, [L. S.]
Comptroller.
D. F. DEADERICK, [SEAL.]
T. M. ROGERS, [SEAL.]
J. PARKHURST, [SEAL.]
103 H. SWIMMER, [SEAL.]
EDMUND WALL, [SEAL.]
F. H. TURNER, [SEAL.]
J. SMITH CRUTTENDEN, [SEAL.]
CHAS. W. CHUMBLEY, [SEAL.]
Sureties.

Approved Aug. 18th, 1882.

S. H. TREAT,
Dist. Judge.

(Endorsed:) Filed August 18, 1882. J. A. Jones, clerk.

104 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the United States circuit court.

I, John A. Jones, clerk of the circuit court of the United States within and for said southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed and the proceedings thereon had in a certain cause, lately pending in said court, wherein Mary Cooke, executrix of the late will and testament of Lyman Cooke, deceased, was plaintiff, and the City of Quincy (in the State of Illinois) was defendant, as fully as the same appear on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in the city of Springfield, in said district, this 4th day of October, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the 107th year.

[SEAL.] J. A. JONES, *Clerk.*

105 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To Mary Cooke, executrix of Lyman Cooke, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein the City of Quincy is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel H. Treat, district judge of the United States for the southern district of Illinois, this 18th day of August, in the year of our Lord one thousand eight hundred and eighty-two.

S. H. TREAT,
District Judge.

106 I accept service of the above citation this 18th day of August A. D. 1882.

WM. MARSH,
WM. McFADON,
Attorneys for Defendant in Error.

(Indorsed:) Citation. City of Quincy vs. Cooke, executrix, &c. On error.

(Indorsement on cover:) No. 1043. The City of Quincy, plaintiff in error, vs. Mary Cooke, executrix of Lyman Cooke, deceased. S. Illinois C. C. U. S. Filed 11th October, 1882.

17-574
FILED
JAN 3 1883
JAMES H. McKENNEY, Clerk

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1882.

THE CITY OF QUINCY, *Plaintiff in Error*,

vs. No. 1043.

MARY COOKE, *Executrix of Lyman Cooke, deceased.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF OF PLAINTIFF IN ERROR.

CARL E. EPLER, City Attorney.

QUINCY, ILL.:
CADOGAN & GARDNER, PRINTERS AND BINDERS.
1882.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1882.

THE CITY OF QUINCY, *Plaintiff in Error*,

vs.

MARY COOKE, *Executrix of Lyman Cooke, deceased.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

STATEMENT OF THE CASE.

In the court below suit was brought in assumpsit against the City of Quincy, with special counts, upon coupons cut from bonds issued by said city to the Mississippi and Missouri River Air Line Railroad Company. The general issue was filed, and the cause tried by a jury. A verdict was found for plaintiff. A motion for a new trial by defendant was sustained. At the June Term 1882, a jury being waived, the case was tried by the court. Judgment was rendered for plaintiff, but the judges composing the court certified a division of opinion as to certain questions of law arising upon the trial, and made special findings of the facts upon which the division of opinion arose. The cause is now brought here for review on writ of error and certificate of division.

From the Special Findings (Printed Transcript 32-37,) it appears, that the City of Quincy has been working under a special charter since 1840, and that there was and is yet in force as part of its charter an act of February 16, 1857, which provided "that the City Council of the City of Quincy, Illinois, be, and is hereby, authorized and empowered (anything contained in the act to which this is a supplement notwithstanding) to issue city bonds to any amount not exceeding, at one time, in the aggregate, the sum of seventy-five thousand dollars, and not bearing a rate of interest higher than eight per cent. per annum, the interest to be paid annually, or semi-annually, at the option of the said City Council;" that by its charter the City Council of said city had power "to appropriate money and provide for the payment of the debt and expenses of the city." (Transcript 33.)

That said City Council, without any law authorizing or requiring it, on June 9, 1868, by resolution, called an election to be held June 27, 1868, to determine whether said city would subscribe the sum of $100,000, to aid in constructing a railroad from West Quincy northwesterly, connecting Quincy with the Missouri Air Line Railroad, payable in thirty year bonds, bearing six per cent. interest, on certain conditions specified; the form of the vote to be "'For Railroad Subscription,' and 'Against Railroad Subscription;'" (Transcript 33,) that an election was accordingly held in said city on June 27, 1868, which resulted in 651 votes for, and 198 votes against, subscription, but that the total number of votes thrown in said city at the last preceding general election was 1707. (Transcript 34.)

That afterwards, on August 7, 1868, the City Council of said city passed "Ordinance 109," ordering "that the mayor of said city be, and is hereby empowered, authorized and directed, in the name and in behalf of said city, to subscribe in the sum of $100,000 to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, said subscription being made to aid in the construction of a railroad from West Quincy northwesterly, connecting Quincy with said Mississippi and Missouri River Air Line Railroad, payable in bonds of said city, bearing six per cent. annual interest, and running thirty years. The above subscription is to be made upon the condition that before payment or issue of said bonds, there shall have been expended

upon said road $50,000 in grading, bridging and tieing the road, commencing at West Quincy to a distance not exceeding 25 miles; and, provided, that due guaranties be given to the city before issuing said bonds that all proceeds of said bonds shall be expended in the construction of said road from West Quincy, and within 25 miles thereof, the City Council of Quincy to determine on compliance with said conditions and issue of bonds in payment of subscription," and that said city of Quincy by its mayor, in pursuance thereof, on August 8, 1868, subscribed in the sum of $100 000, to the capital stock of said railroad company, the subscription being payable in bonds of said city bearing six per cent. annual interest, and running thirty years, and being made subject to the conditions of said ordinance. (Transcript 34).

That said subscription of August 8, 1868, was made without authority of law, other than that, if any, given by the above cited charter provisions of said city, but that before any bonds were issued by said city to pay said subscription, the legislature of the State of Illinois passed an act in force March 27, 1869, as follows:

"An act to legalize the acts of the City Council of the City of Quincy, Illinois, subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company."

SECTION 1. Be it enacted, etc., that the acts of the City Council of the City of Quincy, from June 2, A. D. 1868, to August 28, A. D. 1868 in ordering an election on the proposition to subscribe the sum of $100,000, to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, and the subscription to said stock, and all other acts of said council in connection therewith, are hereby legalized and confirmed." (Transcript 35).

That said railroad company was and is a corporation organized under the laws of Missouri, with its railroad lying wholly in that State, and having its eastern terminus at West Quincy, Missouri, on the Mississippi river opposite Quincy, running its trains regularly into and out of Quincy across the bridge spanning the river at that point. (Transcript 35).

That the City Council of said City of Quincy, issued and delivered to said railroad company, in payments of the subscription aforesaid, and in exchange for stock of said company of like amount at its par value, its thirty year six per cent. bonds, of $500 each, in three different lots, viz: On January 1, 1870, 50 bonds numbered from 1 to 50 inclusive, dated January 1, 1870; on May 18, 1870, 75 additional bonds, numbered from 51 to 125 inclusive, also dated January 1, 1870; and on November 12, 1870, 75 other bonds, numbered from 126 to 200 inclusive, and dated July 1, 1870, but otherwise of like tenor with the bonds above mentioned. (Transcript 35).

The recitals in the bonds were as follows:

"This bond is issued under and by virtue of an order of the City Council of said City of Quincy, passed August 7, A. D. 1868, and of an act of the General Assembly of the State of Illinois, entitled, 'An act to legalize the acts of the City Council of the City of Quincy, Illinois, in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869, said railroad company having been incorporated by an act of the General Assembly of the State of Missouri, entitled, 'An act to incorporate the Mississippi and Missouri River Air Line Railroad Company,' approved February [illegible], A. D. 1857, and of an act amendatory thereto, entitled, 'An act to extend the time for the completion of the Mississippi and Missouri River Air Line Railroad,' approved March 8, 1867, and of a secondary act amendatory of said first named act, entitled, 'An act to extend the Mississippi and Missouri River Air Line Railroad,' approved March 23, 1868." (Transcript 36).

That the 25 coupons sued on and reduced to judgment in this case bore the following numbers: 7, 12, 19 34, 35, 69, 70, 72, 73, 74, 75, 76, there being two coupons of each of said numbers, but maturing at different dates, and one coupon numbered 133; that they were cut from bonds bearing corresponding numbers and issued as aforesaid; and that the plaintiff bought the bonds, from which the coupons sued on were detached, with all the coupons thereto attached and unpaid, embracing those sued on, as a *bona fide* purchaser, for value; that said City of Quincy paid

the interest due on the 200 bonds so issued, regularly for six years after their issue, and that an agent of said City of Quincy, appointed for that purpose, did appear at one or more meetings of the stockholders of said railroad company, several times after July 2, 1870, and voted for said city upon said $100,000 of the capital stock of said company. (Transcript 37).

On the foregoing facts the judges holding said circuit court were opposed in opinion.

1st. As to whether the said act of March 27th, 1869, had the effect to legalize the said election held June 27th, 1868, or the said subscription, if otherwise invalid, made August 8th, 1868.

2d. As to whether the said act by its terms, under the facts above found, created a debt against the City of Quincy without the consent of its corporate authorities.

3d. As to whether said act is or is not constitutional.

4th. As to whether the taking effect of the Constitution of Illinois of 1870, on July 2d, 1870, did not do away with the power to issue the bonds which were issued in November, 1870, and render them unconstitutional and void.

5th. As to whether plaintiff was entitled to recover upon said coupon cut from bond No. 133, without also proving performance of the conditions mentioned in said ordinance 109, passed August 7, 1867, and in the subscription of August 8, 1868, aforesaid.

6th. As to whether the defendant, independently of the alleged curative act of 1869, had power under the act of February 16, 1857, aforesaid, to issue any of said bonds.

7th. Do the facts found as occurring subsequently to the issue of said bonds amount to ratification by the defendant, or estop said defendant from denying the validity of said bonds?

8th. Do the recitals on the face of said bonds estop the defendant from denying the validity of said bonds?

9th. As to whether said bonds were issued for a corporate purpose. (Transcript 37-38).

The City of Quincy defends on the ground of its want of power to issue the bonds.

ASSIGNMENT OF ERRORS.

Afterwards, to-wit, on the second Monday in October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the City of Washington comes the said City of Quincy, plaintiff in error, by Carl E. Epler, its attorney, and says, that in the record and proceedings aforesaid, there is manifest error, and for causes of error assigns the following, to-wit:

1. The court erred in holding that the act of March 27, 1869, had the effect to legalize the subscription made August 8, 1868.

2. The court erred in holding that said act had the effect to legalize the election held June 27, 1868.

3. The court erred in not holding that the act of March 27, 1869, created a debt against the City of Quincy without the consent of its corporate authorities, and that it was, therefore, void.

4. The court erred in not holding the act of March 27, 1869, to be unconstitutional under section 5, of article 9, of the Illinois Constitution of 1848.

5. The court erred in not holding that the taking effect of the Constitution of Illinois, of 1870, on July 2, 1870, did away with the power to issue the bonds issued in November, 1870, and thereby rendered them unconstitutional and void.

6. The court erred in holding that plaintiff was entitled to recover upon the coupon cut from bond numbered 133, without also proving performance of the conditions mentioned in ordinance 109, passed August 7, 1868, and in the subscription of August 8, 1868.

7. The court erred in not holding the bonds issued in November, 1870, to be void under the Illinois Constitution of 1870.

8. The court erred in not holding that under the act of February 16, 1857, the City of Quincy had no power to subscribe stock or issue bonds as aforesaid.

9. The court erred in holding that the facts found as occurring subsequently to the issue of said bonds estopped the defendant from denying the validity of the bonds.

10. The court erred in holding that the recitals in said bonds estopped the defendant from denying the validity of said bonds.

11. The court erred in holding that said bonds were issued for a corporate purpose.

12. The court erred in holding that the facts found were sufficient to support the judgment.

The court erred in all the foregoing errors by rendering a judgment in favor of defendant in error, and the said City of Quincy prays that for said errors the judgment aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment.

CARL E. EPLER,
Att'y for Plaintiff in error.

BRIEF.

Under the 6th point certified a preliminary question arises as to whether the City of Quincy had power to issue railway aid bonds under the act of February 16, 1857. (Record, p. 87).

No doctrine of municipal law is more firmly established than that the power to issue bonds to pay municipal subscriptions to stock of railroad companies must be expressly conferred.

Wells vs. Supervisors, 102 U. S., 625.

Ogden vs. County of Daviess, 102 U. S., 634.

Town of South Ottawavs. Perkins, 94 U. S., 260.

Town of East Oakland vs. Skinner, 94 U. S., 255.

Pendleton County vs. Amy, 13 Wall, 297.

Marsh vs. Fulton Co., 10 Wall, 676.

Thompson vs. Lee Co., 3 Wall, 327.

Starin vs. Genoa, 23 N. Y., 439.

Marshall vs. Cook, 38 Ill., 44.

Harding vs. Rockford, Rock Island & St. Louis Railroad Co., 65 Ill., 92.

Pitzman vs. Village of Freeburg, 92 Ill., 111.

Gaddis vs. Richland Co., 92 Ill., 119.

Welch vs. Post, 99 Ill., 471.

Dill. Mun. Corp., 3d Ed., § 161.

For municipalities to subscribe stock in private corporations is foreign to the ends of their creation, and cannot be deduced from their ordinary grants.

Hewitt vs. Board of Education, 94 Ill., 528.

County of Hardin vs. McFarland, 82 Ill., 138.

The act amended Quincy's Charter. Its City Council was thereby "authorized and empowered (anything in the act to which this is a supplement notwithstanding) to issue city bonds to any amount not exceeding, at one time, in the aggregate, the sum of $75,000, and not bearing a rate of interest higher than eight per cent. per annum, the interest to be paid annually or semi annually, at the option of the said City Council." (Record, p 87.) The language is general, and gives no extraordinary power to issue railway aid bonds.

The act merely furnishes an additional mode of exercising other ordinary charter grants, as "to appropriate money and provide for the payment of the debt and expenses of the city." (Record, p. 87), And the power it confers to issue bonds should be confined to strictly municipal purposes, as to refund debts, or to secure money borrowed for city expenses. This is all that was intended.

The power contended for cannot be had by implication.

Bissell vs. City of Kankakee, 65 Ill., 249.

Then, under the act, the amount of bonds issuable was limited not to exceed "at one time, in the aggregate the sum of $75,000." But the whole issue of the bonds in controversy comprises $100,000. Manifestly the act can not apply here. The limitation must refer to the aggregate of bonds issued at a certain period for any one purpose, to give it effect. To say that, while only $75 000 of bonds could be issued on one day, a like amount could be put out the next would be to destroy the limitation, and render the language of the statute meaningless and absurd.

Further, the recitals in the bonds do not refer to the act of February 16, 1857. The bonds purport to be issued under other authority. (Record, 95).

II.

The first three questions certified (Record, 99) concern the effect to be given to the act of March 27, 1869. (Record, 91-92). The election of June 27, 1868, was held without pretense of law. (Record 87).

Legislative authority to obtain popular assent to subscribe stock and issue bonds is necessary; and an election held without authority of law confers no power to subscribe.

Allen vs. Louisiana 103, U. S. 80.

The subscription ordinance of August 7, 1868, and the subscription made August 8, 1868, had only a void election to stand on. All action so far, being had without enabling law, was a nullity. The record is blank up to the passage of the act of March 27 1869. There was then no defective exercise of pre-existing power to be healed, but an entire want of power to be supplied. This the legislature attempted to do by passing the statute. The bonds recite that they were issued under an order of the City Council of Quincy of August 7, 1868, and of said act of March 27, 1869. (Record, 95). The recitals show the subscription was prior to the passage of the curative act. Every *bona fide* purchaser was bound to know whether there was a law conferring power to issue the bonds, and whether such law was constitutional.

The curative act relied on declares "that the acts of the City Council of the City of Quincy, from June 2, A. D. 1868, to August 28, A. D. 1868, in ordering an election on the proposition to subscribe the sum of $100,000 to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, and the subscription to said stock, and all other acts of said Council in connection therewith, are hereby legalized and confirmed." (Record 91-92).

Section 5, of article 9 of the Illinois Constitution of 1848, provides that

"The corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes."

This clause has been uniformly construed by the Supreme Court of the State of Illinois, as a limitation on the power of the legislature to impose debts for merely local purposes upon a municipality, without the consent of its corporate authorities.

Harward *et al.* vs. St. Clair Drainage Co. 51, Ill. 130.

The People *ex rel.* vs. Mayor etc. of Chicago, Ib. 17.

The People *ex rel* vs City of Chicago, Ib. 58.

The People *ex rel.* vs. Salomon, Ib. 37.

Hessler vs. Drainage Commrs.. 53 Ill., 105.

Lovingston vs Wider, Ib. 302.

Marshall vs. Silliman, 61 Ill., 218.

Wiley vs Silliman, 62 Ill., 170.

Decker vs. Hughes, 68 Ill., 33.

S. & I. S. E. Rwy. Co. vs. Cold Spring Township, 72 Ill., 904,

Sleight vs The People, 74 Ill., 47.

Middleport vs. Ætna Life Insurance Co., 82 Ill., 562.

Barnes vs. Town of Lacon, 84 Ill., 461.

Williams vs. Town of Roberts, 88 Ill., 11.

Gaddis vs. Richland Co., 92 Ill. 119.

People vs. Jackson Co., 92 Ill , 441.

C. B. & Q. Railroad Co. vs. City of Aurora, 99 Ill., 205.

The first case holding this doctrine was

Harward *et al.* vs. St. Clair Drainage Co., 51 Ill., 130.

decided at the January Term, 1869, prior to the passage of the act in question, and long before any steps were taken to issue the bonds in controversy. There a bill was filed to enjoin the levy and collection of taxes by levee commissioners appointed directly by act of the legislature. The court enjoined the tax,

and held the act void, on the ground that the clause of the constitution above cited limited the power of the legislature to grant the right of corporate taxation to any but the corporate authorities, who must be chosen by and with the assent of the people to be taxed.

The doctrine was carried a step further in the Chicago park cases, decided at the June Term, 1869.

In the People *ex rel.* Commrs. of Lincoln Park vs. the Mayor, etc., of Chicago, 51 Ill., 17,

the court held that, under the clause in question, the legislature could not compel a municipal corporation, against its own will, to issue bonds or incur a debt for a merely corporate purpose, like the creation of a public park, or other local improvement.

In the People *ex rel.* vs. the City of Chicago, 51 Ill., 58,

a similar case as to South Park, the court held to the same effect, "that, although the city, by its charter, could establish parks, and the common council issue bonds for that purpose, yet the legislature could not compel them so to do."

The People *ex rel.* vs. Salomon, etc., 51 Ill., 37,

asserts the same doctrine, but the act was sustained there because adopted, after its enactment, by a vote of the people to be affected.

In this it was distinguished from the Lincoln Park case, where there was no such consent given.

The principle was affirmed and acted on next in

Hessler vs. Drainage Commrs., 53 Ill., 105, and

Lovingston vs. Wider, Ib. 302,

decided at the January term, 1870.

In Marshall vs. Silliman, 61 Ill., 218,

a case passed upon at the September Term, 1871, the Supreme Court of Illinois regarded the principle as settled by its former decisions, which were not afterward departed from.

It is the accepted doctrine of this court to follow the construction put upon peculiar constitutional or statutory provisions of a state, when fixed by an unbroken series of decisions by its court of last resort.

Township of Elmwood vs. Marcy, 92 U. S., 289,

where the doctrine in question was followed.

Weightman vs. Clark, 103 U. S., 260.

Town of East Oakland vs. Skinner, 94 U. S, 255.

The principle settled by the cases cited above from the 51st Ill, and decided at the terms of the Supreme Court held in January and June, 1869, is two-fold:

1st. That under the constitution of 1848, the power to incur debts or issue bonds for local purposes could be conferred only upon the corporate authorities of a municipality.

2d. That in so incurring debts or issuing bonds such corporate authorities must act voluntarily.

Decisions in force when a contract or transaction is entered into become a part of it as much as statutes in force at the time.

State of Louisiana *ex rel.* Southern Bank vs. Pillsbury, Sup. Court U. S., op. filed April 10, 1882.

Van Hoffman vs. City of Quincy, 4 Wall, 535.

If they may be relied on to sustain subsequent transactions they may also be invoked as *criteria* of their validity.

To be valid the curative act of March 27, 1869, must stand the above tests. We have seen that the prior action of the city was utterly void and without pretense of law. The language of the act is positive and direct, "legalize and confirm," leaving no discretion to the city.

The purpose of the legislature was clearly to validate the subscription.

But, as was said in the

Silliman case, 61 Ill., 223,

before the passage of this act it was not binding and could not be collected. If it is now binding, it became so for the first time at the passage of the law, and solely by force of the law.

Then under the constitution of 1848, as above construed, this being the effect of the act of March 27, 1869, it was void. The purport and intent of the act was curative and retroactive only, not prospective in its scope, nor to be regarded as enabling and conferring powers for future exercise.

A void law is no law. "When a statute has been adjudged to be unconstitutional it is as if it had never been; rights cannot be built up under it, contracts which depend upon it for their consideration are void."

Cooley Const. Lim., § 188.

The language of the act of March 27, 1869, "legalize and confirm"—is identical with that of the curative acts which were held void in

Marshall vs. Silliman, 61 Ill., 223, and

Township of Elmwood vs. Marcy, 92 U. S., 290.

Similar acts were declared unconstitutional in

Gaddis vs. Richland Co., 92 Ill., 119,

People vs. Jackson Co., 92 Ill., 441, and

Barnes vs. Town of Lacon, 84 Ill., 461.

In refering to to the classes of curative acts deemed void by the Supreme Court of Illinois, this Court, in

County of Jasper vs. Ballou, 103 U. S, 751,

said, "If with the ~~legislation~~ legalization of the vote there was coupled a demand on the corporate authorities to subscribe, *or a confirmation of a subscription already made*, the curative statutes were held to be inoperative."

The act of March 27, 1869, clearly falls within the second class enumerated.

That the subscription was prior to the statute that attempted to "legalize and confirm" it, appears from the recitals in the bonds (Record, 95) and the act there relied on. (Record, 91-92.)

Where the invalidity appears from the recitals of bonds there can be no recovery.

County of Bates vs. Winters 99 U. S.. 83.

This court has upheld curative acts, as to the issue of municipal railway aid bonds under the Illinois Constitution of 1848, only where the matter to be healed was the defective exercise of a power already existing and not where an original want of power was attempted to be supplied. In the case of

Roberts vs. Bolles 101 U. S., 119,

the enabling act was defectively executed. The court held the defects not such as to effect the substance or essence of the election, and that the bonds, therefore, were not issued without consent The decision was grounded on the defective execution of a power as opposed to a want of power; that the legislature could dispense with formalities subsequently which it could have dispensed with in advance.

But the effect sought to be given to the act of March 27, 1869, is to mend a subscription made without any authority of law whatever. The attempt was to supply a want of power, not to heal defects. There had been no legally expressed assent of the city; this assent under *authority* if not under all the *forms* of law, was essential, and could not be dispensed with by the legislature.

"Curative laws may heal irregularities in action, but they cannot cure a want of authority to act at all."

Cooley on Taxation, 227.

"And the legislature cannot validate what it could not previously have authorized."

Cooley Const Lim., 381.

To the same effect is

Williams vs. Town of Roberts 88 Ill., 11.

The subsequent issue of bonds by the city (Record, 93) was merely ministerial and in obedience to the confirmatory language of the act. But the statute of March 27 1869, being void, its invalidity is a complete defense to the claims of defendant in error as a *bona fide* holder.

An act defectively performed under authority might be ratified by the city, if done without power, not. And it is well settled that in the latter case—as here,—any after recognition of the bonds, as by payments of interest, voting stock at corporate meetings of the railroad company (Record, 98) or otherwise, works no estoppel to the city.

Marshall County vs. Cook, 38 Ill., 44.

Bissell vs. City of Kankakee, 64 Ill.. 251.

Middleport vs. Ætna Life Ins. Co., 82 Ill., 562.

Barnes vs. Town of Lacon, 84 Ill., 461.

Gaddis vs. Richland Co., 92 Ill., 119.

Schaefer vs. Bonham, 95 Ill., 368.

Marsh vs. Fulton Co., 10 Wall, 676.

Loan Association vs Topeka, 20 Wall, 655, 667.

Harshman vs. Bates Co., 92 U. S., 569.

Town of E. Oakland, vs. Skinner, 94 U. S., 255.

Anthony vs. Co. of Jasper, 101 U. S., 693.

Buchanan vs. Litchfield, 102 U. S., 278.

Wells vs. Supervisors, 102 U. S., 625.

We further contend that the bonds in question were void as not issued for a "corporate purpose" within Section 5, Art. 9,

Ill. Const., 1848. That clause limited the power of the legislature to impose local taxes on municipalities for other than corporate purposes.

Burr vs. City of Carbondale, 76 Ill., 455.

Livingston vs. Darlington, 101 U. S., 411.

The railroad in question was organized under the laws of Missouri and had its road wholly in that state. (Record, 92.)

To subscribe stock in and issue bonds to such a railroad company, the power must be expressly conferred, by enabling act, otherwise it cannot be exercised.

Allen vs. Louisiana, 103 U. S., 80.

III.

One of the coupons sued on was clipped from bond numbered 133. (Record, 97). Bonds numbered from 126 to 200 inclusive, in amount $37,500, although dated July 1st, 1870, were not in fact issued and delivered until November, 1870. (Record, 93).

In this branch of our brief we shall assume, for the sake of the argument, that the act of March 27, 1869, was valid prospectively. It could not be retroactive; for we have seen it would then have the effect to validate the void subscription of August 8, 1868, a debt against the city would be created, made binding not by action of the city's corporate authorities, but by the act alone. And this was forbidden by section 5, of article 9 of the constitution of 1848. As a curative act, having no subject matter, no power defectively executed, to operate upon, the law of March 27, 1869, was void, and *in toto*, for we contend its scope and purport extended no further.

But the argument will proceed upon the hypothesis that it had some effect as an enabling act, conferring power for future exercise at the will of the city. Even on this theory bonds issued after its passage could draw binding force not from the statute alone, but from the law coupled with the voluntary acceptance by the city of the powers thereby granted. But, as appears from the special finding of facts (Record, 86-98), no such

step was taken by the city as to bonds numbered from 126 to 200, until their issue and delivery in November, 1870.

A separate proviso of the Illinois Constitution of 1870 is as follows:

"No county, city, town, township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption."

This proviso took effect on July 2, 1870, when the people of the State voted to adopt the new Constitution.

Schall vs. Bowman, 62 Ill., 321.

Louisville vs. Savings Bank, 104 U. S., 469.

The fourth question certified is "As to whether the taking effect of the Constitution of Illinois, of 1870, on July 2, 1870, did not do away with the power to issue the bonds which were issued in November, 1870, and render them unconstitutional and void." (Record, 99).

Clearly, the exception to the proviso does not apply here as it is found as a fact that the election of June 27, 1868, was called and held without authority of law. (Record, 87).

And at all events, said election, being held under no existing laws, was a nullity.

Allen vs. Louisiana, 103 U. S., 80.

The City is not estopped to show that the true time of the issue and delivery of the bonds numbered from 126 to 200, inclusive, was in November, 1870, although they bore date July 1, 1870. (Record, 93).

Anthony vs. County of Jasper, 101 U. S., 693.

Bayley vs. Taber, 5 Mass., 286.

Louisiana vs. Wood, 102 U. S., 294.

Dill. Mun. Corp, 3d Ed., § 543.

There is no presumption in favor of bonds delivered after the constitution of 1870 took effect. The *onus* of proving their validity is on the *bona fide* holder.

Louisville vs. Savings Bank, 104 U. S., 469.

Town of E. Oakland vs. Skinner, 94 U. S., 255.

Town of Prairie vs. Lloyd, 97 Ill., 161.

Town of Windsor vs. Hallett, 97 Ill., 210.

People vs. Jackson Co., 92 Ill., 441.

Wright vs. Bishop, ~~84~~ 89 Ill., 302.

Middleport vs. Ætna Life Ins. Co., 82 Ill., 562.

Jackson County vs Brush, 77 Ill., 59.

Power to subscribe stock and issue bonds must be expressly given, and is no contract of itself, but mere legislative authority, repealable before acted on. If while executory, a statute or constitution takes away the power, a subsequent issue is void.

Concord vs. Portsmouth Savings Bank, 92 U. S., 630.

Aspinwall vs. County of Jo. Daviess, 22 How., 634.

Railroad Company vs. Falconer 103 U. S., 821.

Harshman vs Bates County, 92 U. S, 575.

Dill. Mun. Corp., 3d ed., § 539.

The continuing authority, if any, flowing from the act of March 27, 1869, was cut off by the constitutional prohibition on July 2d, 1870, if not already exercised.

But the record shows that, as to the bonds bearing numbers over 125, the corporate authorities of the City of Quincy did not attempt to exercise such authority until November, 1870, long after the power was taken away. And it is incumbent upon the

defendant in error, in order to recover, to show an acceptance of the power assumed conferred, and a vesting of rights, before July 2d, 1870. This she has not done. The issue of the bonds in November, 1870, was, therefore, *ultra vires* and void.

Wright vs. Bishop, 84 Ill, 304.

The fifth question certified is "As to whether plaintiff was entitled to recover upon said coupon cut from bond numbered 133, without also proving performance of the conditions mentioned in said ordinance 109, passed August 7, 1868, and in the subscription of August 8, 1868, aforesaid." (Record, 99).

The bonds recite their issue "under and by virtue of an order of the City Council of said City of Quincy, passed August 7th, A. D. 1868." And the text of the act of March 27, 1869, recited, relates to the subscription of August 8, 1868. (Record, 95-87). A *bona fide* holder would be put on inquiry as to the contents of the "order" or subscription ordinance of August 7, 1868. It was a matter of record, and set forth the conditions of the subscription. (Record, 90).

The main question, as to the bonds issued in November, 1870, is whether a contract to issue such bonds was complete July 2, 1870, when the new constitution took effect. The *onus* of showing this, under the authorities above cited, is on the holder. And a contract must be clearly proved before it invokes the protection of the Federal Constitution.

Concord vs. Portsmouth Savings Bank, 92 U. S., 630.

But the act of March 27, 1869, *proprio vigore*, could not complete any contract, under section 5 of article 9, of the Illinois Constitution, of 1848, continued in section 9, of article 9, of the constitution of 1870. This only the city could do.

Even upon the assumption that the act was enabling in its scope, it was entirely optional with the City Council of Quincy, to accept of its authority or not, and the subscription was binding only in so far as they chose to make it so. They were free to issue any part of the $100,000 of bonds the act permitted them to do, and then stop. But the subscription, the law of March 27, 1869 allowed them to ratify, was conditional, as above

seen. To create that mutuality of obligation essential to a contract, after passage of the law making it possible, there must have been a compliance with the conditions precedent—as expending $50,000 on the first 25 miles of the road running out from West Quincy—along with the ratification of the subscription by the city, unless the City Council saw fit to dispense with their performance. It does not appear from the special findings that such conditions were complied with, (Record, 86-98,) nor that the City Council had waived them, as to the bonds numbered over 125, up to July 2, 1870. The holders of bonds issued in November, 1870, must show one or other of the above things in order to recover. The burden of proof is on them to show an agreement existing July 2, 1870, to issue those bonds. There was then no mutuality between the parties. The city was not bound to issue the bonds in question. nor the company to go on and build the road. Each was free to do as it chose.

Power to make the subscription binding was then taken away by the new constitution. After that the City Council had no power to dispense with conditions, to agree to subscribe, nor to consent to issue bonds. Having no power to act, they had no power to estop themselves. The constitution of 1870, found the contract inchoate, and left it incapable of completion.

Railroad Co. vs. Falconer, 103 U. S. 821,

lately decided by this court, is an analogous case. There a majority of tax payers of a township petitioned for permission to issue $200,000 of bonds to a railroad company, but on condition that the road be constructed through a village in the town before the bonds should be delivered to said company or sold. The petition was granted, and commissioners duly appointed, who were empowered and directed to subscribe for the stock and to issue the bonds, upon performance of the conditions. The road was not built, nor agreed to be built, on January 1st, 1875, when the amended constitution of New York took effect, prohibiting all municipal aid to corporations or individuals, by subscription of stock or otherwise. The decision was that on January 1, 1875, neither party was bound, the contract was inchoate, and the power to complete it taken away. The case was distingnished from

County of Moultrie vs. Savings Bank, 92 U. S. 631.

Aspinwall vs. County of Jo Daviess, 22 How, 364,

was where the county was authorized to subscribe stock and issue bonds upon a majority vote. After a favorable election, the Constitution of November 1st, 1851 took effect, forbidding counties to subscribe for stock, to be paid out in bonds. But afterward stock was subscribed and bonds issued as voted for. It was held that the vote without more did not constitute a contract, and that the constitution took away the power to issue the bonds, which were accordingly void.

Town of Concord vs. Portsmouth Savings Bank, 92 U. S, 625,

is a case from Illinois that turns on the same principles with the one at bar. It illustrates the need of a continued existence of the *power* to issue the bonds, and shows what did *not* constitute a completed contract before the power was repealed by the constitution of 1870. Under an enabling act of March 7, 1867, the town of Concord, on November 20th, 1869, voted that it would make a donation to the Chicago, Danville and Vicennes Railroad company, provided the company would run its railroad through the town. On June 20, 1870, the company gave notice of its acceptance of the donation. But under the law of March 7, 1867, "the town was not empowered to make the donation until the road was located and constructed through the town. It had no authority to make a contract to give." The court held the acceptance of the railroad company was "no engagement to locate and build the railroad through the town, that there was no consideration for the town's promise to give, even if the popular vote can be considered a promise. There was no contract to be impaired." The act of March 7, 1867, was ineffective after July 2, 1870, and "that after that date the power no longer existed in the municipality." That when the bonds were delivered in October 1871, the town had no authority to make the donation, and that, consequently the bonds and coupons were void.

The City of Quincy presents a stronger case, as to the bonds issued in November, 1870, than was made out by the town of Concord, for the consideration of the court. The act of March 27, 1869, gave no force to the prior and void subscription of

August 8, 1868. Even on the hypothesis that the act conferred power on the city for future exercise, it became ineffective after July 2, 1870. Up to that date the city had taken no step to avail itself of the continuing authority flowing from that statute as to the bonds in question. It did not even agree conditionally to issue them. No contract of any kind was made or attempted. The power to act, while yet executory, was taken away July 2, 1870. The city had no authority to exercise in November, 1870, and as a necessary consequence the bonds it issued at that time are void.

The facts in the case at bar are essentially different from those in

County of Moultrie vs. Savings Bank, 92 U. S., 631.

There the statute of Illinois, of March 26, 1869, incorporating the Decatur Sullivan and Mattoon Railroad Company, authorized the Board of Supervisors of Moultrie County to subscribe not over $80,000 to the stock of said company, and to issue bonds therefor when the road should be open between certain points. Before this occurred, and on December 14, 1869, the board ordered that an $80,000 subscription to the stock of the company be made, and that bonds should be issned to pay the same when the road was open for traffic. This resolution was entered on the records of the county, and on the minutes of the company, and the latter corporation disposed of the bonds promised by contract. This Court held the county had complete authority by the act of March 26, 1869, to make a present subscription, that this included the power to agree to subscribe, and that the resolution of December 14, 1869, was at least an agreement to subscribe, which, being acted upon by the company, amounted to a contract beyond the power of the constitution to impair.

But in the case now before the court the facts were directly the opposite. The City of Quincy never made avalid agreement to subscribe stock to the Mississippi and Missouri River Air Line Railroad Company to be paid for in the bonds afterwards issued in November, 1870. The election of June 27, 1868, the subscription ordinance of August 7, 1868, and the subscription of

August 8, 1868, were all without authority of law, as before shown. The subsequent act of March 27, 1869, under the constitution of 1848, could not validate them *proprio vigore*. There was no agreement to subscribe that the law could recognize. And from the passage of that law up to July 2, 1870, the special finding of facts shows that the City of Quincy took no steps to agree to issue the bonds numbered over 125. After that time the power was gone. There was no contract *in esse* for the contitution of 1870 to impair.

Further, it was held that the *bona fide* purchaser of the bonds in the Moultrie case was protected by their recitals. Said recitals show the bonds were issued in pursuance of a subscription made by the county board in December, 1869 in conformity to the act of March 26, 1869. There the face of the bonds shows the subscription was made *after*, and dependent for its authority on, a *prior* enabling act. The bonds in suit recite directly the reverse, (Record, 95) that they were issued under an order of August 7, 1868, and the *subsequent* act of March 27, 1869. Under the Constitution of 1848, there is a vital difference in effect between the recitals in the respective bonds. In the Moultrie case the resolution of December 14, 1869, was the voluntary act of the Board of Supervisors accepting, and concurring with, the legislative authority conferred by the act of March 26, 1869, and thereby binding on the county. But here, the prior subscription ordinance of August 7, 1868, was without any authority of law to sustain it, and void, leaving the bonds to rest for their validity on the curative act alone. But the act of itself could not have that effect under the constitution of 1848, and this a purchaser of the bonds was bound to know. The recitals apprised him of the invalidity of the bonds. If he inquired whether the city had accepted the power, if any, given by the act of March 27, 1869, he would have found that no steps were taken or any agreement made, to issue any of the bonds numbered over 125, until long after the power so to do was taken away.

The doctrine of estoppel certainly cannot be appealed to, to sustain any of the bonds in suit; for the defence going to their validity, the void character of the bonds is an answer to the claims of even a *bona fide* holder.

Marsh vs. Fulton Co., 10 Wall, 676.

Loan Association vs. Topeka, 20 Wall, 655.

Wells vs. Supervisors, 102 U. S., 625.

Harshman vs. Bates Co., 92 U. S., 569.

Williams vs. Roberts, 88 Ill., 11.

Barnes vs. Town of Lacon, 84 Ill., 461.

Marshall Co. vs. Cook, 38 Ill., 44.

Recitals in such case are no protection. The fact that the bonds in suit recite that they are issued "under and by virtue of" the act of March 27, 1869, (Record, 95,) does not estop the city from showing their invalidity, nor that bonds numbered from 126 to 200, inclusive, were issued after and in violation of the constitution of 1870.

Town of Concord vs. Savings Bank, 92 U. S., 625.

The bare fact of the issue of those bonds in November, 1870, works no estoppel to the city.

Buchanan vs. Litchfield, 102 U. S, 278.

And there are no direct recitals in the bonds of compliance with the constitution of 1870, or of facts taking them out of its operation, (Record, 95), even if such recitals were held to preclude the city from showing a subsequent and void issue.

And the defence going to the want of power of the city to issue the bonds, after acts of recognition as payments of interest, or attending and voting stock at corporate meetings of stockholders of the railroad company, after July 2, 1870, (Record, 98), work no estoppel to the city.

Marsh vs. Fulton Co., 10 Wall, 676.

Marshall vs. Cook, 38 Ill., 44,

and authorities before cited.

We urge that the act of February 16, 1857, gave Quincy no power to issue the bonds in suit; that the whole scope and purport of the curative act of March 27, 1869, was to legalize and confirm a prior void election and subscription,—to supply an entire want of power; that this being its attempted effect, under Section 5, of Article 9, of the Illinois Constitution of 1848, the act was wholly void, and the bonds and coupons issued under it, invalid. We further insist that, even assuming that the statute of March 27, 1869, conferrred power upon the City of Quincy for future exercise, the continuing authority flowing from it was cut off by the constitutional prohibition taking effect July 2, 1870, and that the City of Quincy, had, therefore, no power to issue the bonds and coupons delivered in November, 1870. For which reasons a reversal of the judgment is respectfully asked.

CARL E. EPLER,
City Att'y for Plaintiff in Error.

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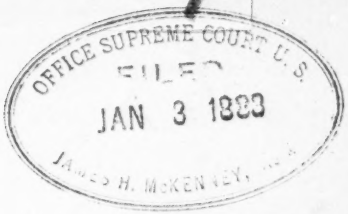

IN THE

SUPREME COURT

OF THE UNITED STATES.

No. 1043.

THE CITY OF QUINCY, *Plaintiff in Error*,

vs.

MARY COOKE, *Executrix of Lyman Cooke, deceased.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

REPLY OF PLAINTIFF IN ERROR.

BY CARL E. EPLER, CITY ATTORNEY.

FILED JANUARY, 1883.

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OCTOBER TERM, A. D. 1882.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

REPLY OF PLAINTIFF IN ERROR.

I.

Opposing counsel rely on

City of Quincy vs. Warfield, 25 Ill., 281,

to prove that authority to issue the bonds here in controversy was granted by the act of February 16, 1857. (Record p. 87.) The bond there in suit was issued in lieu of another overdue city bond, with interest thereon. The point decided was that the law authorized the step. Anything in the opinion beyond that was mere *dictum*. When the court said the statute conferred a general power to issue bonds "within a fixed limit, as to amount, * * and without any regard to purpose," only ordinary municipal purposes were intended, and no extraordinary power to give aid to railways. So far as the case goes,

it holds the act empowered the city to issue bonds to fund prior indebtedness, and in that supports the position already contended for in behalf of plaintiff in error. (Argument in chief, pp. 8. 9.)

II.

It may be conceded that:

"Unless there be a constitutional inhibition, a legislature has power, when it interferes with no vested right, to enact retrospective statutes to validate invalid contracts, or to ratify and confirm any act it might lawfully have authorized in the first instance."

U. S. Mortgage Co. vs. Gross, 93 Ill., 494.

But Section 5, of Article 9, of the Illinois Constitution of 1848, vesting the corporate authorities of counties, * * cities, etc., with power to assess and collect taxes for corporate purposes, has been uniformly construed by the supreme court of that State as a restriction upon the power of the legislature to pass validating acts.

1 Dill. Mun. Corp., 3d Ed., note 1 to §544.

Cooley Const. Lim., 4th Ed., note 1 on p. 475.

And cases cited on p. 11 of argument in chief. And that construction has been recognized and acted on by this court.

Township of Elmwood vs. Marcy, 92 U. S., 293.

As the questions here raised hinge upon that constitutional clause, we may seek their solution in the decisions of this court, and of the Illinois supreme court, bearing upon the point.

But the limitation placed by that clause upon the power of the legislature, as developed by the cases, is two-fold:

1st. That the power to incur debts or issue bonds for local purposes, could be conferred only upon the corporate authorities of a municipality.

2d. That in so incurring debts or issuing bonds, such corporate authorities, *whoever they are*, must act voluntarily. (Argument in chief, p. 13.)

On the first point the controversy has been, *as to who constitute the corporate authorities of a municipality*, and on this question a distinction has been taken between *cities* and *townships*, much dwelt upon by counsel for defendant in error.

While in *Keithsburg vs. Frick*, 34 Ill., 405, as to an incorporated town, it was held that the power to incur debt by issuing railway aid bonds might be conferred directly upon the corporation without the intermediary of a popular vote, the position was taken, in *Marshall vs. Silliman*, 61 Ill., 225, in 1871, that "the town supervisors and clerk do not represent a township, as the board of trustees represent an incorporated town, or the common council represent a city," that the corporate authorities of a township were its legal voters, and that, before bonds could be issued, the project must be submitted and carried at an election, held under authority of law. And this doctrine has been adhered to since then in the following *township* and county decisions

Wiley vs. Silliman, 62 Ill., 170.

Middleport vs. Ætna Life Ins. Co., 82 Ill., 567.

Barnes vs. Town of Lacon, 84 Ill., 463.

Williams vs. Town of Roberts, 88 Ill., 11.

Gaddies vs. Richland Co., 92 Ill., 119.

People vs. Jackson Co., Ib., 441.

But, as to who are the corporate authorities of a *city*, there has been no change of view, the earlier and later cases agreeing that the common council of a city are its corporate authorities, who may be directly empowered to issue bonds without a vote. And, in this, *Keithsburg vs. Frick* was approved in after city cases.

Q. M. & P. R. R. Co. vs. Morris, 84 Ill., 410.

C., B. & Q. R. R. Co. vs. City of Aurora, 99 Ill., 210.

Opposing counsel have erroneously assumed that our defense was predicated on the above distinction, as to who are the cor-

perate authorities of a *township*, and have apparently shaped their arguments on that assumption. We concede, that the distinction does not affect cities and does not invalidate the city of Quincy bonds in suit, and, therefore, cuts no figure in the case. Nor does the distinction at all affect our defense, which is based on the other branch of the doctrine above noted, namely: that no debt for local purposes can be created against a municipality in Illinois without the legal consent of its corporate authorities, *whoever they are.* And in holding this, the authorities, cited on page 11 of our argument in chief, are uniform. Nor are they all *township* decisions, as opposing counsel appear to contend. The doctrine was applied to *cities* in

The People *ex rel.* vs. City of Chicago, 51 Ill., 17.

The People *ex rel.* vs. City of Chicago, Ib., 58.

Cairo & St. Louis R. R. Co. vs. City of Sparta, 77 Ill., 505.

C., B. & Q. R. R. Co. vs City of Aurora, 99 Ill, 205.

And to an incorporated town in

Decker vs. Hughes, 68 Ill., 46.

And has been unswervingly adhered to since first announced.

This court will follow the construction which has been uniformly given to the constitution or laws of a State, by its highest court.

Fairfield vs. Co. of Gallatin, 100 U. S., 47.

But opposing counsel claim, that the principle just mentioned, was established too late in point of time to affect the coupons now in suit. The "rights of the parties are to be determined according to the law, as it was judicially construed to be, when the bonds in question were put on the market as commercial paper."

Douglas vs. Co. of Pike, 101 U. S., 687.

Township of Elmwood vs. Marcy, 92 U. S., 289.

The finding of facts shows that bonds numbered from 1 to 50 inclusive, were issued January 1, 1870; the second instalment

numbered from 51 to 125 inclusive, on May 18, 1870; and the last lot numbered from 126 to 200 inclusive, not until Nov. 12, 1870. (Record, 93.)

The effect of section 5, of article 9, of the constitution of 1848, was thoroughly discussed and passed upon in the Chicago park cases, decided by the Illinois Supreme Court at the June Term, 1869. One of these.

The People *ex rel.* vs. Mayor, etc., of Chicago, 51 Ill., 17,

was where an act of the legislature created a board of commissioners to buy lands for a park. The statute, among other things, provided as follows:

"For the purpose of paying for the land taken for such park, under the provisions of this act, the bonds of the City of Chicago, to such an amount as shall be necessary for that purpose, shall be issued by the mayor, comptroller and clerk of said city, from time to time, as the same shall be required by the board of park commissioners, for the purpose aforesaid, and shall be delivered to said board upon demand."

The commissioners negotiated for the land, demanded of the mayor, comptroller and clerk $500 000 of Chicago City bonds to pay for the same. On refusal of the city officials to issue them, the commissioners, in an action of mandamus, sought to compel their delivery.

The Court held that, under the constitutional clause in question, the legislature could not compel a city to issue its bonds against its will to erect a park or the like. On page 36, the Court say, "we do not, of course, intend to be understood by this reasoning, as asserting that the legislature cannot authorize the proper corporate authorities of a municipality to issue its bonds for corporate purposes for more than fifty thousand dollars even without a vote of the people. What we do say is, that an attempt by the legislature to compel a municipality to do this without a popular vote or the assent of its duly elected corporate authorities, is not in harmony with the spirit of this provision of the constitution."

The People *ex rel.* vs. City of Chicago, 51 Ill., 58,

was a similar case, decided at the same term to the same effect.

That the legislature could not fasten a debt upon a city without the consent of its corporate authorities, was, then, declared law in Illinois, in June, 1869, shortly after the act of March 27, 1869, was passed, and long before any of the bonds in question were issued. It should, therefore, be recognized as a governing principle in the case at bar.

The contention of the opposing counsel that this court should disregard the above decisions in 51 Ill., is not tenable. For "this court declines to adopt the later decisions only in excepted cases, where at different times different constructions have been given to the constitution and laws of a state, and rights have been acquired under the former construction, when the earlier decisions will be followed."

Fairfield vs. Co. of Gallatin, 100 U. S., 47.

But there were no earlier Illinois decisions construing the constitutional clause under consideration differently.

And in Elmwood vs. Marcy, 92 U. S., 293,

after referring to the construction put upon said clause in the Silliman and earlier cases, by the Illinois Supreme Court, it is said that "that learned tribunal has given no decisiions at variance with them."

In a later case this court said:

"It is true that, according to the settled construction of the Constitution of Illinois, in force in 1869, the legislature could not require or compel the corporate authorities of a county, city, or town, against or without its consent, to subscribe to the stock of a railroad company. But it could *authorize* such corporate authorities to make subscriptions with or without referring the question to the people immediately interested."

Roberts vs. Bolles, 101 U. S., 126.

So also, in County of Jasper vs. Ballou, 103 U. S., 751,

it was regarded as settled by the Silliman and earlier cases in Illinois that the legislature could not "compel corporate authorities to create debt without their consent," although the corporate authorities, "whoever they might be," might be authorized to act without a vote of the people, and that, "if, with the legalization of the vote there was coupled a demand on the corporate authorities to subscribe, *or a confirmation of a subscription already made*, the curative statutes were held to be inoperative."

The subscription was prior to the act attempting to "legalize and confirm" it, as appears from the recitals in the bonds (Record, 95,) and the act itself. (Record, 91, 92) Up to the passage of the statute of March 27, 1869, the subscription of August 8, 1868, was without authority of law and a nullity.

If the subscription became valid then, it was solely by force of the law, its binding character came from the act alone, which could not have the effect to validate, to supply an entire want of power, under the constitution of 1848. The act being void, the bonds issued under it are void.

III.

Counsel for defendant in error cite some few cases to show that the general assembly of Illinois, under the constitution of 1848, had a broader and less restricted power to pass validating acts than is above contended. One was

Cowgill vs. Long, 15 Ill., 202,

where there was legislative authority for a school district voting a tax, but it was improperly voted in July, instead of on some Saturday in May or June, as the enabling act provided, and a subsequent act was passed expressly to mend this defect. There is a broad distinction between that and the case at bar. As was said in

Marshall vs. Silliman, 61 Ill., 226.

"The tax, in that case, (Cowgill vs. Long) was a valid tax, and when the court say, in their opinion, that it was improperly voted in July, they evidently mean merely that it was improperly voted in that month, for the purpose of collection during the

current year. The tax was legally imposed, and the only question decided by the court was, that the subsequent act of the legislature legalizing the steps by which the tax was illegally certified to the county court and placed in the course of collection during that year, was so far effectual that the tax could be collected by virtue of the act. The act dealt with a subject entirely under the control of the legislature, namely, the subject of remedy. The question before the court was very different from the ratification of a void tax by retrospective legislation, which the legislature could not, of its own power, impose prospectively."

The above applies here equally as well.

Town of Keithsburg vs. Frick, 34 Ill., 405,

decides as to an incorporated town, that power to subscribe stock and issue bonds to railways, may be conferred directly upon the president and trustees, without the intermediary of an election. The main point adjudged is as to *who are* corporate authorities in such a case.

Then it was no direct decision on the validity of a curative act. as the court say the subscription may be based either on the law of 1849, as confirmed by the act of 1857, or as an original subscription under the last named act Further, both the *Cowgill* and the *Keithsburg* cases—if the latter be deemed a direct adjudication—were instances where the defective execution of a power already existing was validated. While here there was an entire want of power to act when the subscription was made. Uunder the constitution of 1848, even if the one could be supplied, the other could not.

Roberts vs. Bolles, 101 U. S., 119.

Argument in chief, p. 15.

In St. Joseph Township vs. Rogers, 16 Wall, 644,

the bonds were dated and issued October 1, 1867, under an act of February 28, 1867. A curative act was passed to obviate such informalities as the failure of the township clerk to keep a perfect record of election, and to file a certain certificate with

the county clerk. We take it the decision is not in point for several reasons:

1st. The vote there had been had under the *authority* if not under all the *forms* of the enabling law of February 28, 1857. Hence it was a case of a defective execution of power already granted.

2d. So far as *St. Joseph Township vs. Rogers*, may be deemed to hold a doctrine contrary to that of *Elmwood vs. Marcy*, 92 U. S.. 289, as opposing counsel contend, this court must have modified or over-ruled it to that extent in the latter decision.

3d. The *St. Joseph* case stands upon a different footing as to facts from the one at bar, in that the bonds of that township were issued October 1, 1867, nearly two years before the Illinois supreme court held, in *People vs. Mayor of Chicago*, 51 Ill., 17, in 1869, that the legislature could not create a debt against a municipality without the consent of its corporate authorities,—while none of the bonds now in controversy were issued until 1870.

And, even if the earlier Illinois had held a different doctrine, the principle declared in the above cited Chicago cases, would govern here, as Quincy issued no bonds until long after it was settled.

IV.

On the foregoing principles the attempted curative act of March 27, 1869, could not be retroactive. Even if it be given a prospective effect—as was assumed, for the sake of argument, at page 17 of our argument in chief—before the prior subscription could have become binding, the corporate authorities of Quincy must have accepted the permission so conferred.

The two things had to concur. In other words, the void subscription of August 8, 1868, could have been ratified only by the voluntary acts of Quincy's City Council, under a valid legislative leave so to do. This flows as a necessary corollary from the restriction imposed by section 5, of article 9, of the constitution of

1848. A clear and authoritative illustration of the position taken is furnished by

Cairo & St. Louis R. R. Co. vs. City of Sparta, 77 Ill., 505.

There the city was empowered, by an act of 1867, to subscribe stock to the railway company, payable in bonds, to run not exceeding *ten* years. The proposition submitted and carried at a popular election, ordered by the City Council, and held December 21, 1868, was that the bonds should be payable in not less than *twenty* years. Afterwards, on March 3d, 1869, the legislature passed an act amending the railway company's charter, which was in force April 15, 1869, and which, among other things, declared all elections theretofore held in any county, city, or town, in reference to a subscription to said railroad, to be legal and binding, and that the corporate authorities of any city, or town, in which such elections had been already held, and a majority of the votes cast were for subscription, "shall have authority to issue bonds for such an amount as was voted for, notwithstanding any insufficiency, informality or irregularity in such election, or in the notice thereof." The action was mandamus to compel the issue of the bonds.

The court held that "the act of submission and the vote were in excess of the power, making the vote taken illegal and without binding effect." And, also, "it is contended, that the above amendatory act made valid the vote to issue the bonds, if it were not so before. So far as the sanction of legislative authority is required, this seems sufficient. Under this act the city may have authority to issue the bonds, and yet, not be compelled to do so," under the constitution of 1848.

The court added, "there appears here nothing of acquiescence or ratification on the part of the city since the taking of the vote; there has been no issuing and passing of bonds into the hands of innocent purchasers, giving rise to any question of estoppel from acts, or non-action, in the above respects," deciding that there was no case for a mandamus.

In the case at bar it is clear that all unexercised power, if any, flowing from the curative act of March 27, 1869, was cut off by the prohibition in the constitution taking effect July 2, 1870.

The question of importance, then, as to the bonds issued in November 1870, turns on whether, in the interval of the city's power to act between March 27, 1869, and July 2, 1870, there was any such ratification or acquiescence as to the prior void subscription of August 8, 1868, on the part of Quincy's corporate authorities.

The order of the City Council, of August 7, 1868, directing that subscription, being unauthorized, the members had a right to regard as an idle form of no effect, and to absent themselves, and abstain from voting on the measure.

But it does not appear from the finding of facts that anything was done by the City Council as to the bonds numbered over 125 until November, 1870, when they were issued.

Then it was too late to act. The power was gone.

Schall vs. Bowman, 62 Ill, 321.

Richards vs. Donagho, 66 Ill, 73.

It cannot be argued, on the theory that the curative act had a future operation, that, by the issues of bonds, on January 1st and May 18th, 1870, the City Council, of Quincy, ratified the invalid subscription of August 8, 1868, to the full amount of $100,000.

For, since any ratification by the city was altogether voluntary, the *extent* of its ratification was also optional. It could go so far and then stop. The city was no more bound by the January and May issues, to issue the bonds afterward delivered too late in November, 1870, than the City of Chicago was held bound to appropriate money for South Park, because it had previously made voluntary appropriations for another park, in

People *ex rel.* vs. City of Chicago, 51 Ill., 62.

The matter was there considered one of discretion in the common council, which could not be coerced.

The statement, on p. 23 of the argument submitted by Messrs. Grant and Grant for defendant in error, that all conditions pre-

cedent were complied with by November, 1870, is not supported by the facts found. The City Council might dispense with performance of conditions as to part of the bonds, and yet have good reasons for refusing to do so as to the rest. But in Nov. 1870, the City Council of Quincy had no power to bind or to estop the city in any way.

On page 22 of the same argument it is stated that the bonds issued in November were executed July 1, 1870. This is a mere matter of inference, and is not sustained by the finding of facts. At all events the time of delivery is the material point, until when no bonds take effect. To say, that the bare fact that the bonds issued in November were dated July 1, 1870, should take them out of the operation of the constitution of 1870, would enable the prohibition it contains to be evaded at any time thereafter by ante-dating, and would be repugnant to the decisions in

Anthony vs. Co. of Jasper, 101 U. S., 693.

Bayley vs. Taber, 5 Mass, 286,

and other cases, cited on pages 18 and 19 of our argument in chief.

Even if the attempted curative act was valid prospectively, there having been no "ratification or acquiescence" by the corporate authorities of Quincy, after March 27, 1879, and before July 2, 1870, of or in the prior void subscription as to the bonds issued in 1870, those bonds were void, and, as to the coupon cut from bond numbered 133, the facts founds were insufficient to support the judgment.

In behalf of defendant in error, Messrs. Grant and Grant in their argument, discuss the bearing of Section 12, of Article 9, of the constitution of 1870, upon the bonds issued in November, 1870. But the question is gratuitously imported by them into the case, as it does not arise upon the facts found, nor upon the certificate of division, and therefore, their reasoning upon the point requires no answer.

V.

The proviso in the separate section of the new constitution, relating to municipal aid to railways, does not save the bonds issued in November, 1870, for the election of June 27, 1868, was held "under no existing law," as insisted on page 18 of our argument in chief. That the curative act of March 27, 1869, did not validate that election is substantially admitted at page 5 of the brief of Messrs. Marsh & McFadon for defendant in error. And it is so decided in effect by

Q., M. & P. R. R. Co. vs. Morris, 84 Ill., 415.

Town of Concord vs. Savings Bank, 92 U. S. 625,

appears only partially modified by

Louisville vs. Savings Bank 104 U. S. 471,

and Fairfield vs Co. of Gallatin, 100 U. S. 47.

In the latter cases, this court, following the Illinois supreme court, holds donations within the saving clause "when authorized by existing laws," and reverse the Concord decision in so far as it holds a contrary doctrine. The donation of the town of Concord was "authorized by existing laws," but the subscription and vote in the case at bar were not. And, we take it, the Concord case is still law to this extent, that an undertaking to subscribe stock or to donate to railways in Illinois, inchoate July 2, 1870, was, by the prohibition of the constitution taking effect that day, rendered incapable of completion, if not within the exception of the saving clause. And this satisfies the purpose of our argument in the case at bar.

County of Clay vs. Society for Savings, 104 U. S., 579,

cited by opposing counsel, is not in point. The facts were different. There, in pursuance of an election duly held April 22, 1868, on November 1, 1869, the county board subscribed a $50.000 donation of its bonds to the railroad company, both vote and donation being fully authorized by prior enabling law. The subscription was after and in acceptance of such legislative authority, and therefore created a contract beyond the power of

the constition of 1870 to impair. But here, as to the bonds issued in November, 1870, the legislative permission, if any, given by the act of March 27, 1869, was not exercised or acted on before July 2, 1870, when it was annulled and withdrawn, there being no contract *in esse* at the time.

Decker vs. Huges, 68 Ill., 33,

relied on in behalf of defendant in error, is not a parallel case with the one now before the court. For there the vote and subscription were under, and after the passage of, the enabling act of March 5, 1867, but before July 2, 1870. So the contract was completed before the new constitution was in force, and the issue of the bonds after July 2, 1870, was merely ministerial, and carrying out the prior obligation.

In Mason vs. Shawneetown, 77, Ill., 533,

cited by opposing counsel, express charter power was given to issue levee bonds, and the election ordinance in pursuance of it had the force of law within the city, and the vote was, therefore, "authorized by existing laws" within the exception of the prohibitory proviso. But the election of June 27, 1869, in the case at bar, had no such charter provision to rest upon.

VI.

Counsel for defendant in error contend that section 24, of the schedule to the Illinois Constitution of 1870, excepts the City of Quincy from the operation of the prohibition therein. But that section merely related to a project of the City of Quincy to subscribe $500,000 to the Quincy, Missouri & Paciffc Railroad Company, on which a vote had been taken and carried without warrant of law, and the scope and object of the section was only "to leave ths vote and the power of the legislature to confer the right upon the city to take stock, precisely as they would have been under the constitution of 1848," as appears from

Q. M. & P. R. R. Co. vs. Morris, 84 Ill., 410.

The language of that section of the schedule, manifestly, could only have reference to a case where the general assembly had

not then "authorized the City of Quincy to create any indebtedness for railroad or municipal purposes," which was the case there in hand. And under it, the legislative act relating to the Q. M. & P. bonds, was passed at the first session of the legislature *after* the adoption of the constitution.

The aim of the section was to leave the general assembly power to supply legislative sanction to the issue of bonds where it was then wanting, and it could not apply to, nor be called for by, the situation in the case at bar, where the curative act of March 27, 1869, was already passed.

CARL E. EPLER,
City Attorney, for Plaintiff in Error.

17-547

OFFICE SUPREME COURT U.S.
FILED
DEC 26 1882
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 1043.

OCTOBER TERM, 1882.

THE CITY OF QUINCY, PLAINTIFF IN ERROR,

vs.

MARY COOK, EXECUTRIX OF LYMAN COOK DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF ILLINOIS.

ARGUMENT FOR DEFENDANT IN ERROR, BY JAMES GRANT AND WHIT. M. GRANT.

FILED, , 188 .

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 1043.

THE CITY OF QUINCY,
Plaintiff in Error.

vs.

MARY COOK, Executrix of Lyman Cook, Deceased.
Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

ARGUMENT FOR DEFENDANT IN ERROR,

BY JAMES GRANT & WHIT. M. GRANT.

STATEMENT OF THE CASE.

The special findings of the court, beginning on p. 32 of the record, show that Quincy is incorporated and exists under a special charter passed in 1840 by the Legislature of Illinois, which charter has been variously amended since that time.

That an amendment of February 16, 1857, (record, p. 33,) authorized the city to issue bonds to any amount, the only limitation or condition imposed being that not to exceed $75,000 should be issued at one time nor bear interest at a greater rate than 8 per cent.

That the city council, at a meeting held June 9, 1868, without any law requiring an election, passed a resolution providing for an election June 27, 1868, to vote upon the proposition authorizing the city to subscribe the sum of $100,000 to aid in the construction of a railroad from West Quincy, northwesterly, connecting Quincy with the M. A. L. R. R., payable in bonds bearing 6 per cent. annual interest, running thirty years, provided that said subscription shall be dependent upon Lewis county, Missouri, subscribing an equal amount, and before payment or issue of bonds there shall have been expended on the road $50,000 in grading, etc., within twenty-five miles of Quincy, also that due guarantees be given that the proceeds of said bonds be expended in said construction within said twenty-five miles; the city to determine on the compliance with conditions and issue of bonds.

That at said election 651 votes were cast for and 198 against said subscription.

That on August 7, 1868, the city council passed ordinance No. 109, (record, p. 34,) directing its mayor to subscribe for the city $100,000 to the capital stock of the M. & M. R. A. L. R. R. Company, to aid in the construction of a road from West Quincy connecting Quincy with said railroad, payable in thirty year bonds bearing 6 per cent annual interest, said subscription to be made upon condition that before payment or issue of bonds there should be expended $50,000 on said road in grading, etc., within twenty-five miles of said city, commencing at West Quincy, and that due guarantees be given before issue of said bonds that all the proceeds thereof should be used in the construction of said road within said twenty-five miles, commencing at West Quincy, said city council to determine upon compliance with said conditions and issue of said bonds.

That in pursuance of said ordinance said mayor, on August 8, 1868, subscribed $100,000 to the capital stock of said railroad company, payable in thirty-year 6 per cent. annual interest bonds, upon conditions named in said ordinance.

Before the issue of any of said bonds the Legislature of Illinois amended said charter by an act approved March 27, 1869, (record, p. 35,) which provides, "That the acts of the city council of the city of Quincy, from June 2, 1868, to August 28, 1868, in ordering an election on the proposition to subscribe the sum of $100,000 to the capital stock of the M. & M. R. A. L. R. R. Company, and the subscription to said stock and all other acts of said council in connection therewith are hereby legalized and confirmed."

That the M. & M. R. A. L. R. R. Company, is a Missouri corporation, owning a railroad in said state, with its eastern terminus at West Quincy, opposite the city of Quincy, and owns and has run since its road began to be built, its trains into and out of the city of Quincy over the railroad bridge of the Quincy Bridge Company spanning the river and connecting said cities.

That on January 1, 1870, the city council of Quincy issued and delivered to said railroad company in part payment of said subscription, fifty bonds of $500 each, No. 1 to 50, dated January 1, 1870, payable in thirty years, bearing 6 per cent. interest, and received from said company 250 shares of stock of the par value of $100 each.

That on May 18, 1870, in further payment of said subscription, issued seventy-five more bonds of $500 each, No. 51 to 125, same as the first, and delivered them to said company, and received 375 shares more of stock, $100 each;

and November 12, 1870, in full payment of said subscription, delivered to said company seventy-five more of said bonds $500 each, No. 126 to 200, and dated July 1, 1870, same as first, and received 376 shares of said stock, $100 each. Said bonds and coupons are payable to bearer in New York, and recite (record, p. 36,) that they are issued under and by virtue of an order of the city council of said city of Quincy, passed August 7, 1868, and of an act of the General Assembly of the State of Illinois, entitled "An act to legalize the acts of the city council of the city Quincy, Ill., in subscribing to the capital stock of the M. & M. R. A. L. R. R. Company." Approved March 27, 1869, reciting, also, the incorporation of said railroad company in Missouri.

That the city of Quincy paid the annual interest on all said bonds for six successive years after their issue, and appointed an agent to vote said stock who did vote the same at one or more meetings of the stockholders of said railroad company for and in behalf of said city, after July 2, 1870. That the plaintiff is a *bona fide* holder for value before maturity and without notice.

The case was tried to the court without a jury and judgment rendered for the plaintiff and a certificate of division given (record, p. 37) upon the questions:

First. Whether the legalizing act of March 27, 1869, had the effect to legalize the election of June 27, 1868, or the subscription, if otherwise invalid, of August 8, 1868.

Second. Whether said act created a debt against the city without its consent.

Third. Whether said act is not unconstitutional.

Fourth. As to whether the taking effect of the Constitution of Illinois of 1870 on July 2, 1870, did not do away with the power to issue the bonds which were issued in November, 1870, and render them unconstitutional and void.

Fifth. As to whether plaintiff was entitled to recover upon said coupon cut from bond No. 133 without also proving performance of the conditions mentioned in said ordinance 109, passed August 7, 1868, and in the subscription of August 8, 1868, aforesaid.

Sixth. Whether the city had power, under the act of February 16, 1857, to issue the bonds.

Seventh. Do the facts subsequent to the issue amount to a ratification, or estop the city from denying the validity of the bonds.

Eighth. Do the recitals on the face of the bonds estop the city from denying their validity.

Ninth. Whether the bonds are issued for a corporate purpose.

The Constitution of Illinois, 1870, was ratified by vote of the people July 2, 1870. Section 12 of Article 9 is as follows:

§ 12. No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Any county, city, school district or other municipal

corporation, incurring any indebtedness as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to prevent any county, city, township, school district or other municipal corporation from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this Constitution, in pursuance of any law providing therefor.

Under "Separate Sections," there is a section with the heading "Municipal Subscriptions to Railroads or Private Corporations," as follows:

"No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption.

And under the Schedule, Section 1, is as follows:

§ 1. That all laws in force at the adoption of this Constitution, not inconsistent therewith, and all rights, actions, prosecutions, claims and contracts of this state, individuals or bodies corporate shall continue to be as valid as if this Constitution had not been adopted.

And Section 24, as follows:

§ 24. Nothing contained in this Constitution shall be

so construed as to deprive the General Assembly of power to authorize the City of Quincy to create any indebtedness for railroad or municipal purposes, for which the people of said city shall have voted, and to which they shall have given, by such vote, their assent prior to the thirteenth day of December, in the year of our Lord one thousand eight hundred and sixty-nine: *Provided*, That no such indebtedness so created shall, in any part thereof, be paid by the state, or from any state revenue, tax or fund, but the same shall be paid, if paid at all, by the said City of Quincy alone, and by taxes to be levied upon the taxable property thereof: *And, provided further*, That the General Assembly shall have no power in the premises that it could not exercise under the present Constitution of this state.

There are several cases against the City of Quincy — all of the facts could be incorporated in one record, and to save expense this was done, and this case selected. The only point in which we are interested not in common with all the others is covered by the fourth and fifth clauses of the certificate of the division of opinion. (Record pp, 37 and 38.)

ARGUMENT.

We will not go into the details of the questions certified up.

We have incorporated *supra* the parts of the Constitution of 1870, bearing upon the questions at issue. A copy of the amendments to the charter of February 16, 1857, and March 27, 1869, and of ordinance 109, and of one of the bonds and coupons appear in the record on pages 33, 34, 35 and 36, and we do not deem it necessary to reprint them here.

I.

The parts of the Constitution relied upon to defeat plaintiff's recovery are Sec. 12 of Art. 9, *supra*, which limits the indebtedness of municipal corporations to 5 per cent. of the last assessment for State and county purposes previous to the incurring of such indebtedness. If the Constitution stopped there, the city would have no ground for its claim, but this section adds that it shall not be construed to prevent the issue of bonds in compliance with any vote of the people which may have been had prior to the adoption of this Constitution in pursuance of any law providing therefor.

They answer there was a vote, but not one in pursuance of any law providing therefor. It is true there was no legislative act providing for a vote, but the act of March 27, 1869, legalized the vote had, and that gave to it the same force and effect which would have resulted from a previous authority.

There is no constitutional inhibition against legalizing or validating laws in Illinois, and without it subsequent sanction is equivalent to original authority.

1 Dillon's Municipal Corporations, 3d Ed., p. 540, Sec. 544, and cases in note 1.

Cooley's Constitutional Limitations, 4th Ed., ch. 8, p. 278, and cases in note 2.

Also chapter 11, p. 474, which we quote: "It has not usually been regarded as a circumstance of importance in these cases whether the enabling act was before or after the corporation had entered into the contract in question; and if the Legisture possesses that complete control over the subject of taxation by municipal corporations which has been declared in many cases, it is difficult to perceive how

such a corporation can successfully contest the validity of a special statute, which only sanctions a contract previously made by the corporation, and which though at the time *ultra vires*, was nevertheless for a public and local object and compels its performance through an exercise of the power of taxation."

See also cases in Notes 1 and 2 and Note 1 on p. 475.

Such law is sanctioned by the Supreme Court of Illinois:

In re E. R. Tuller, 79 Ill. 99
U. S. Mortgage Co. *v.* Gross, 93 Ill. 483.
Cowgill *v.* Long, 15 Ill. 202.
Keithsburg *v.* Frick, 34 Ill. 405.

and many others.

This question came before this court in a case from Illinois, where bonds were authorized to be issued if ratified at an election called by the *county court*. The election was called by the *Board of Supervisors*. The election was subsequently legalized by act of the Legislature, and the subscription authorized as voted, and the bonds were issued. Under a subsequent refunding act, these bonds were taken up and new refunding bonds issued, and the holder of the new bonds was also the holder of the old. The case was not disposed of upon this point, but the justice delivering the opinion of the court said, that without this refunding act the old bonds would have been void under the decisions of the Supreme Court of Illinois made prior to the vote had. It had not prior to that time been held by that court that an act which simply legalized an invalid or irregular election for a subscription and left the corporate authorities free to subscribe or not as they chose, would

not cure any defect in the election and empower the authorities to bind the corporation by anything that might be done within its scope.

It had been decided that the Legislature could not *compel* a municipal corporation to incur a debt without the consent of the municipal authorities. The Constitution of 1848 did not require a vote, and the Legislature could authorize the corporate authorities to act without the express direction of the people. What it could not do was to make it mandatory on them to subscribe without a vote. (Page 751): "This we understand to have been the extent of the decisions, and in this way it was that if with the legalization of the vote there was coupled a command on the corporate authorities to subscribe, or a confirmation of a subscription already made, the curative statutes were held to be inoperative." The decision in favor of the validity of said bonds was affirmed.

County of Jasper *v.* Ballou, 103 U. S. 745.

This decision was rendered at the October term, 1880, ten years subsequent to the issue of our bonds in November, 1870, and expresses the law as expounded by the Supreme Court of Illinois at that time (1880.) What were the decisions in Illinois prior to November 12, 1870? We have shown the general rule to be that a legalizing act, where not prohibited by the Constitution, is equivalent to original authority.

This principle had not then been denied in Illinois. On the contrary, it had been sanctioned in *Keithsburg* v. *Frick*, 34 Ill. 405, where a vote and subscription were legalized in this language: "The subscription heretofore made by said corporation to the capital stock of the Warsaw & Rockford Railroad Company of a sum not exceeding

$20,000 * * * * is hereby legalized and confirmed to the full extent and for the purpose for which such subscription was made, &c." Another section of the act authorized the subscription without a vote.

The court (p. 421) says : There was no necessity for a vote, as the act grants the power to the president and trustees. " But if the subscription was made under the organization allowed by the general incorporation law of 1849," (under which the vote and subscription legalized were had,) " the 17th section of the act of 1857 " (the one quoted from above) " legalizes and confirms it p. 874. The subscription, therefore, was good if made under the the act of 1857 as an original subscription under the second section, or as a subscription made under the act of 1849, confirmed, as it is, by the seventeenth section of the act of 1857. The bonds may be regarded as issued by the old corporation, confirmed by the new act, or as a new issue under the second section of the act of 1857."

This decision was at the April term, 1864. and remained the undisputed law in the State down to the September term, 1871, and so far as this direct point is concerned, until a later date. Under the sanction of that case, these and thousands of other bonds were issued and cast upon the market and the money of innocent third parties invested in them under the supposition that the question of their legality was settled.

In *Cowgill* v. *Long*, 15 Ill. 202, (in 1858,) a school tax was voted on a Saturday in July and certified by the clerk October 15th. The law required it to be voted on a Saturday in May or June and to be certified up by the clerk before July 1st. Cowgill filed a bill to restrain the sale of his property thereunder and, while his suit was pending,

the Legislature passed an act that the vote had and tax voted on July 20th are declared good, valid and effectual in law and equity, and the act of the clerk in certifying, etc., are declared good, legal and effectual, etc.

The court says: "The tax might properly have been voted on any Saturday in May or June, * * * but the tax was improperly voted in July. It was then too late to have the same charged on the assessment for 1850. A school tax could not be included in the tax book of that year unless it was reported to the county clerk before the first of July. This provision of the statute is imperative and in no sense discretionary. It is as essential to the validity of a school tax that it be certified to the Count Clerk by the day designated as it is to the validity of a state and county tax that the assessment be made and returned within the time limited. If this were the only point in the case the complainant would be entitled to the relief demanded."

The court then adds that the legalizing act was passed to cure these deffects, which it was clearly competent to do. Such laws are often passed, and there can be no serious objection to their validity, and the decree dismissing the bill was affirmed. To same effect see St Joseph Township vs Rogers 16 Wal 644

These decisions were not repudiated by that court prior to November 12, 1870, when the last of these bonds were delivered. Subsequent to the time these decisions were rendered great numbers of bonds were issued, some fraudulently and some without consideration or authority for their issue, and the result was that many municipal corporations became oppressed by the burdens they imposed, and it became important for these municipalities to get rid of them if possible, and they began to bitterly oppose them, and the state courts sympathizing with them, as

they naturally would, declined to extend the doctrines they had laid down, and began to hedge them off, distinguish and finally to repudiate them.

In *People* v. *Chicago*, 51 Ill. 17, (June term, 1869,) where the Park Commissioners were authorized to lay off and improve Lincoln Park and direct the city authorities to issue bonds to pay the expense, a mandamus was asked directing the mayor, etc., to issue bonds, and it was refused because, as the court says, it was a delegation to others of the duties which could only be imposed upon the corporate authorities. And in *Harwood* v. *St. Clair Drain Co.* 51 Ill. 130, (January term, 1869,) the court decides that the taxing power can not be granted to others than the regular corporate authorities, and that if it should be claimed that the Drain Commissioners were such corporate authorities then the act was void, because it appointed them and the Constitution provided that all corporate authorities should be elected by the people.

As far back as *Supervisors, etc.*, v. *People*, 25 Ill. 181, it was held that the Legislature could not delegate to the county court the duties incumbent upon the Supervisors.

In none of these cases was the force and effect of a validating act considered ; so that the law on that subject on November 12, 1870, stood as announced in *Dillon and Cooley*, in *Cowgill* v. *Long* and in *Keithsburg* v. *Frick*.

In *Marshall* v. *Silliman*, 61 Ill., 218, (Sept. Term, 1871), a township subscription was voted and made without authority, by the Supervisors and Town Clerk, and the Legislature passed an act by which the election was *legalized and confirmed and declared to be binding upon said township and might be collected in the same manner as if made under*

the provisions of said act. The court says: "This law, if valid, had the effect of creating a debt against the township. It declares the subscription is binding and may be collected from the township in the same manner as if it had been legally made. Before the passage of this act it was not binding and could not be collected. If it is now binding it became so for the first time at the passage of this law, and is so solely by force of the law." If this latter proposition is not true and is not the law, what is or would ever be the need or force of a curative act? The court adds: "The question, then, whether the subscription is binding does not depend merely upon whether the Legislature can pass a retrospective law, but whether it can create a debt against a town, etc." "It cannot be said that the town ever consented to the creation of this debt. The so-called vote was an idle form, etc."

It is useless to say the people have not assented, and if a legalizing act could not be made to cure such a defect, then it could not have the force almost universally conceded to it by all the courts, including that one prior to that time. The court adds that a debt cannot be created by the Legislature against the town without its assent.

They distinguish it from *Keithsburg* v. *Frick*, and on page 225 say that "the Town Supervisors and Clerk who issued these bonds do not represent a township as the board of trustees represent an incorporated town, or common council represent a city. The Supervisor and Town Clerk are but a part of the corporate authorities, etc."

That was sufficient to dispose of the case, and ~~would have~~ left ours and many other cases as they were under *Keithsburg* v. *Frick*; but it evidently was not sufficiently sweeping, so the court adds, "But even if these two officers

could be recognized as the corporate authorities they can not be said to have voluntarily incurred this debt on behalf of the town. The act gave them no discretion."

They also distinguish it from *Cowgill* v. *Long*, *supra*, and conclude that "the so-called curative act was a violation of the Constitution. Its object was to compel this town to issue its bonds for railroad stock independently of its own wishes, and this was beyond the limits of legislative power. It sought to accomplish this by declaring that a void proceeding was a valid one; that a vote confessedly illegal was in fact legal. But this vote was an accomplished fact. Whether it was within the corporate powers of the town and binding upon its people, was a question which no subsequent legislation could affect, and when the Legislature undertook to say that this vote created a valid obligation against the town, when it did not, it was attempting by its own act to create a corporate debt."

We understand this case to decide that the Supervisor and Town Clerk do not represent a township as a Council does a city, and extra duties cannot be delegated to them by the Legislature, and for the first time that a curative act which legalizes a subscription creates a debt and is void.

But note the distinction between that act and the one now before the court.

This doctrine is affirmed in subsequent decisions. See—

Wiley *v* Silliman, 62 Ill.
Williams *v*. Roberts, 88 Ill. 11.
Gaddis *v*. Richland Co., 92 Ill. 119.

This latter case, decided in June, 1879, goes so far as to hold that a retroactive law which merely legalizes an elec-

tion and authorizes the subscription, is unconstitutional as creating a debt without the consent of the people, and construed the act which passed under review by this court in *County of Jasper* v. *Ballou*. It is apparent that the Supreme Court of Illinois has by these decisions, and without any aid from the Constitution, attempted to do away with the power of the Legislature pass curative acts, at least in aid of municipal bonds, by townships as to which they overrule the doctrine in *Coogill* v. *Long* and *Keithsburg* v. *Frick*, though in *Marshall* v. *Silliman* they distinguish them. In *Gaddis* v. *Richland Co.* they assume that they have been overruled.

One thing is clear: that up to the date of the passage of this act — nay, to the issue of these bonds, (Nov. 12, 1870), the Supreme Court of Illinois had uniformly approved retrospective or curative acts, even those which legalized elections and subscriptions.

The decisions of that court to the contrary since that time would destroy the value of negotiable securities put in circulation upon the authority of its former decisions, and creates a conflict of authority in the decisions of the court. For these reasons, if no others, this court will not follow these later decisions. There is scarcely an exception to this rule. And See —

Thompson *v.* Perrine, 103 U. S. 806.
Roberts *v.* Bolles, 101 U. S. 119.
County of Livingston *v.* Darlington, 101 U. S. 407.

In *Elmwood* v. *Marcy*, 92 U. S. 289, the learned Justice rendering the opinion follows the doctrine of *Marshall* v. *Silliman*; but we think, clearly under a mistaken idea of the points in issuse and actually decided.

The question before the courts and the only one to be

decided was that the Supervisor and Clerk could not be clothed by the Legislature with the power of taxation and creating a debt against the town without a vote of the people, who with the Supervisor and Clerk constituted the corporate authorities. Whatever was said in *Marshall* v. *Silliman* in addition to that is mere *dictum*, and contrary to the doctrine of *Keithsburg* v. *Frick*; and it is apparent that the court overlooked that fact in *Elmwood* v. *Marcy* in giving its assent to it, for in that case it was unnecessary to go further; and that the full extent of the decision in *Keithsburg* v. *Frick* is there overlooked is apparent from the subsequent decisions in *Roberts* v. *Bolles*, 101 U. S. 119 and *County of Jasper* v. *Ballou*, 103 U, S. 745, where those cases (*Marshall* v. *Silliman* and *Elmwood* v. *Marcy*) are not followed.

The language of the curative acts considered in *Marshall* v. *Silliman* and *Elmwood Marcy*, *supra*, is essentially different from that now before the court, and not open to the objections there raised. Though we will concede that later decisions in Illinois would make the same objection good in all Township cases.

If this act is not void, as we think we have clearly shown it is not as to these bonds, then the point that the indebtedness thereby created exceeds the 5 per cent. authorized by the Constitution amounts to nothing, since the plaintiff is a *bona fide* holder and the bonds recite that they are issued under and by virtue of the ordinance and the act.

The word "under" has been construed to mean "subject to, or in pursuance of." (*Mills* v. *Stoddard*, 8 How 345–366.)

And when bonds recite that they are issued under, or in pursuance, or by virtue of the law, the corporation is

estopped from asserting that the requisite conditions did not exist to authorize their issue.

Marcy *v.* Oswego Township, 92 U. S. 637.
Humboldt Township *v.* Long, 92 U. S. 642.
Wilson *v.* Salamanca, 99 U. S. 499.
Buchanan *v.* Litchfield, 102 U. S. 278–292.
Bonham *v.* Needles, 103 U. S. 648.

If our theory of the case is the correct one, this constitution does not control these bonds, and the limitation therein has no application. They are subject only to the Constitution of 1848. And even if this were not true the recitals contain nothing to arouse suspicion that the bonds issued are in excess of the amount authorized, and are conclusive against the city.

II.

The amendment to the charter of Feb. 16, 1857, grants to the city of Quincy unlimited power for the issue of bonds, the only limitation or condition being that not to exceed $75,000 in the aggregate shall be issued at any one time, nor shall they bear a greater rate of interest than 8 per cent (Record p. 33). The bonds are absolutely authorized for any purpose in the discretion of the city, and clearly covers our bonds.

Quincy *v.* Warfield, 25 Ill. 317.

III.

But plaintiff in error says this is not applicable to your bonds, and even if it were, there is no estoppel, as the bonds recite only the legalizing act. Every amendment to the charter becomes incorporated into and forms a part of it, and every citation of an amendment includes at least all the charter adopted prior to that time. These bonds

recite the amendment of 1869. That is sufficient. It is not necessary to recite all the law, nor is it material if the wrong law be recited.

Johnson Co. *v.* Jaunary, 94 U. S. 202.
Smith ~~v~~ Clark Company., 54 Mo. 58.
Chouteau *v.* Allen, 70 Mo. 290.

A.

There was a vote favoring the subscription; there was no law requiring a vote, unless it be the legalizing act, where the law does not provide how a power shall be exercised and the authorities in their discretion submit the question to a vote of the people; that is a *vote* had in pursuance of law under Sec. 12 Art. 9, Constitution 1870, and brings this case clearly within its exception.

Mason *v.* Shawneetown, 77 Ill. 533.

The clause in the Constitution on municipal subscriptions, under separate sections, quoted *supra*, that no municipality shall become a subscriber or make a donation to a railroad, expressly provides that it shall not be so construed as to affect the right of any municipality to make such subscription where the same has been authorized under existing laws by a vote of the people of such municipality prior to such adoption.

The difference between this clause and Sec. 12 of Art. 9 is that the latter provides that the *issue* of *bonds* shall not be prevented where there was a previous vote, and this provides that the *subscription* shall not be prevented where there was a previous vote, and the argument on that is applicable to this.

V.

Section 1 under the schedule provides "that all laws in force at the adoption of this Constitution not inconsistent therewith, and all rights, actions, prosecutions, claims, and contracts of this state, individuals or bodies corporate shall continue to be as valid as if this Constitution had not been adopted."

This subscription, if valid, constituted a contract between the Railroad Company and the City, and was expressly saved by the above clause from the operation of the prohibitory clauses of the Constitution.

Moultrie Co. *v.* Savings Bank, 92 U. S. 631.

And Section 24 of the Schedule expressly excepts Quincy from among the corporations subject to the prohibition therein.

What we have heretofore said is equally applicable to Section 5, Article 9 of the Constitution of 1848, or Section 9, Article 9 of the Constitution of 1870, in so far as they have any application to this case.

VI.

If our position is correct, that there was a proper vote, either under the Act of Feb. 16, 1857, or the legalizing Act of 1869; and a lawful subscription thereunder, or under the Act of 1857 without a vote prior to the adoption of the Constitution of 1870, then the bonds are not void by reason of anything contained therein. Making the subscription created a contract and left nothing to be done but to complete its obligations by issuing the bonds—if no vote was required, the subscription was equivalent thereto, and equally within the saving clause of the Constitution.

Moultrie Co. *v.* Savings Bank, 92 U. S. 631.
Decker *v.* Hughes, 68 Ill., 33.
County of Clay *v.* Society for Savings, 104 U. S. 579.

VII.

Plaintiff in error insists that we were not entitled to recover on coupon 133, issued in November, 1870, because there was no completed contract at the date of the adoption of the Constitution, and cites *Concord* v. *Portsmouth, Savings Bank*, 92 U. S. 625. If the subscription was a valid one then this case comes clearly within *Moultrie Co.* v *Savings Bank*, and *Clay Co.* v. *Society for Savings, supra.*

The case of *Concord* v. *Savings Bank*, applies solely to *donations* which it was held were not excepted from the constitutional prohibition, and has no application whatever to a subscription; and has been overruled in *Fairfield* v. *Gallatin Co.*, 100 U. S 47, and *Louisville* v. *Savings Bank*, 104 U. S. 469.

In *Railroad Co.* v. *Falconer*, 103 U. S. 821, also cited, the commissioners there had no power to subscribe. They were authorized to subscribe at a future time, upon the performance of a condition precedent. That condition did not happen until the power to subscribe was taken away by the Constitution. The court held that the attempt of the commissioners to subscribe did not create a binding contract, and distinguish it from the Moultrie Co. case *supra.*

A.

The issue of the bonds in November is wholly immaterial. They bear date July 1, 1870, before the adoption of the Constitution. The plaintiff is admitted to be a *bona fide* holder, and under the recitals, if there was any author-

ity for the issue, the plaintiff in error is estopped from showing the issue in Novembr. This is not the case of a bond *ante* dated fraudulently or for any improper purpose. They were executed and the delivery delayed to await compliance with the conditions precedent.

B.

Plaintiff in error takes the very novel position that no contract was consumated until the issue of the bonds. That the authority of the city, if it had any in the premises, was not a continuing one, and its authority as to all acts unperformed at the date of the adoption of the Constitution, July 2, 1870, was abrogated by it, hence it could not by a recital made in November, 1870, bind itself. That in order to recover it was incumbent on us to show affirmatively that this bond was authorized by a *vote* under existing laws prior to the adoption of the Constitution; and cites a number of authorities, among them *Concord* v. *Portsmouth Savings Bank*, 102 U. S. 625, and *Railroad Co.* v. *Falconer*, 103 U. S. 821. But they are not authority in this case. In the first the decision was based solely upon the ground that it was a donation, not a subscription, and donations were not saved by the exception in the Constitution. In the latter the decision is upon the ground that it was an agreement to subscribe upon performance of conditions. The conditions were not performed nor the subscription made when the power to subscribe was cut off by the Constitution—hence the subscription and issue of bonds could not be enforced.

The case now before the court comes directly within *Moultrie Co.* v, *The Savings Bank*, 92 U. S. 631, and *County of Clay* v. *Society for Savings*, 104 U. S. 579, and *Decker* v. *Hughes* 68 Ill., 33, the last decided in 1873, where the sub-

scription had been made before the adoption of the Constitution, and nothing left to be done but to consumate the contract by the issue of the bonds, which was done after July 2, 1870, and the bonds held valid, and the recitals estoppels. That is true whether we regard these bonds as issued under the subscription legalized by the Act of March 27, 1869, or under the subscription as made by authority of the Act of Feb. 16, 1857.

It is nonsense to call this a continuing power under which no steps had been taken July 2, 1870, by the city to avail itself of the authority flowing from the statute. If there was authority to subscribe, and we think we have shown there was, then the subscription made prior to July 2, 1870, made a binding contract which comes directly within the exception in the Constitution.

The bonds recite the amendment to the charter of March 27, 1869, which we claim includes the whole charter as amended and in force at that time, recite the order of subscription of Aug. 7, 1868, and the charter of the M. & M. R. A. L. R. R. Co. That is sufficient. The actual subscription was made by the Mayor Aug. 8, 1868, (Record p. 34.) The order of Aug. 7 contained the conditions upon which the subscription was made, and the subscription was in fact made as therein directed—hence the recital is as perfect an estopel for bonds issued after as before July 2, 1870. It was not material or proper that the bonds should recite compliance with the Constitution of 1870. They were, in fact, executed July 1, 1870, before the adoption, but not actually delivered until November, 1870, when the conditions of their issue had been complied with. They do recite facts which, take them without the operation of the Constitution. That is equivalent to a recital of compliance with it, even if

that were necessary in this case, and is all that is essential to work a complete and perfect estoppel.

C.

But plaintiff in error says in November, 1870, the authorities had no power to represent the city, and their recitals therein of occurrences prior to July 2, 1870, do not work any estoppel, you must prove up your case, and cite *Jackson county* v. *Brush*, 77 Ill. 59, decided in 1875. This was a case where a bill was filed to enjoin the delivery of bonds by the county officials to the railroad company. It appeared that the vote was had prior to July 2, 1870, and the subscription made afterwards. The court held that in order to enable the railroad company to get the bonds, it must show affirmatively that the subscription had been authorized under existing laws by a vote of the people had prior to the adoption of the Constitution.

And *Wright* v. *Bishop*, 88 Ill. 302, (in 1878.) This was a bill by a tax-payer to restrain the corporate authorities from issuing bonds voted in August, 1870. The court said the burden rests on those claiming the right to issue bonds, or asserting the validity of bonds issued to railroad companies since the Constitution of 1870 to show affirmatively that they were authorized by a vote under existing laws prior to the adoption of the Constitution.

And *People* v. *Jackson Co.*, 92 Ill. 441 (in 1879). This was a petition by the Cairo & St. L. R. R. Co. for a writ of mandamus to compel the issue of bonds by the county to it. Here the vote was had June 9, 1868, under the act of 1849. The County Court canvassed the election and declared a majority of votes in favor of the subscription. There was a second vote in favor of a second $100,000 of

bonds on July 24, 1869. Aug. 10, 1871, the County Court entered an order reciting the elections and the results in favor of the subscriptions, and ordered a subscription of $100,000 under each vote. This was accepted by the railroad company. The railroad was built and cars run as agreed. The court recites its holding in 77 and 82 Ill. *supra* as to necessary proof and adds that the recitals by the County Court are not binding since the order was made after July 2, 1870, as it then had no power to thus bind the county. That in order to recover plaintiff must still show a valid vote, that proper notice of election was given and that the law was in other respects pursued; that the Constitution abrogated all unexercised powers.

And *Town of Prairie* v. *Lloyd*, 97 Ill. 179 (in 1881). This was a bill by a tax-payer to restrain collection of a tax levied to pay interest on railroad donation bonds. The court said the bonds issued after July 2, 1870 were *prima facie* void, and the burden of showing their issue in compliance with a vote had prior to the adoption of the Constitution in pursuance of law providing therefor, rests on the party affirming their validity. The election was held Dec. 10, 1869, for a donation. The bonds issued by the Supervisor and Town Clerk Jan. 14, 1874 and registered with the Auditor Jan. 15, 1874. The only questions in dispute were whether the Supervisor and Clerk were the corporate authorities intended by the act, and whether the question of levying a tax should not have been submitted with the question of donations to a vote of the people. The court answered the first in the affirmative and the latter in the negative, and the bill was dismissed. What was said about the burden of proof was mere *dictum*.

And *Town of Windsor* v. *Hallett*, 97 Ill. 204. This was an action to recover on ten coupons due Jan. 1, 1868, from

bonds issued to the O. R. R. Co. on a donation voted at election Oct. 7, 1869, and accepted by the company. All the controverted facts were found by the lower court for the plaintiff. The bonds were issued by the Supervisor and Town Clerk. The court held they were the proper authorities to issue them under the act and distinguish it from cases heretofore decided as to the power of these officers to create a debt. There the question was as to their power to create a debt—here merely to issue the evidences of debt authorized by the vote.

In none of these cases has the court passed upon the effect of an estoppel by recital in favor of a *bona fide* holder of the bonds, and limited as the decisions must be to the questions properly before the court I cannot see that we have any occasion here to complain of them.

And *Town of Middleport* v. *Ætna Life Insurance Co.* 82 Ill. 562 (in 1876). This was a case upon coupons from bonds by a *bona fide* holder. This was a donation voted prior to July 2, 1870, to be paid by a tax levy. The Supervisor and Clerk issued the bonds to pay the donation. The court held the bonds void; that the Clerk and Supervisor had no authority to issue them as the vote was for a donation to be paid *by a tax;* that any donation or issue of bonds was prohibited. The court then goes on to say that the burden rests on the party alleging the validity of bonds issued since the adoption of the Constitution to show affirmatively that they were authorized by a vote under existing laws prior to the adoption of the Constitution.

It is plain enough, all this is mere dictum, the question was not before the court. The sole question was one of legal authority for the issue of bonds, the law only authorising a tax—even here it does not appear what recitals the

bonds contained, if any, nor what their effect would be in favor of a *bona fide* holder.

Suppose the Supreme Court of Illinois had held (which it has not) that recitals made by corporate authorities since the 2d of July, 1870, do not create an estopel in favor of a *bona fide* holder, It would not then be such a construction of the statutes or Constitution of Illinois that this court be bound to follow and adopt it. It would come clearly within that class of cases where this court has said, over and over again, it would not be bound, but would decide for itself. It is a question of general commercial law. If the corporate authorities still have power under the exceptions in the Constitution to bind the corporation, they have the same power under that exception to recite and to estop by recitals, within the scope of the exceptions, that they had before the Constitution was adopted. Any other proposition is such nonsense that we cannot believe this court will for a moment entertain it.

There is nothing in *East Oakland* v. *Skinner*, 94 U. S. 255, or *Louisville* v. *Savings Bank*, 104 U. S. 469, to aid plaintiff in error on this point.

This court has had occasion to consider the effect of such recitals in *Moultrie Co.* v. *Savings Bank*, 92 U. S. 631 ; *Louisville* v. *Savings Bank*, 104 U. S. 469 ; *Walnut* v. *Wade*, 103 U. S. 683 ; and in every instance they have been held conclusive as estoppels ; and in more than one of them at least some of these Illinois cases were before the court, and we are willing to abide by the ruling there made.

VIII.

A railroad is a corporate purpose within the scope of

the laws and Constitution of the State of Illinois, for which local taxes may be imposed by municipal corporations.

Q. M. & P. R. R. Co. *v.* Morris, 84 Ill. 410, and cases cited.

And it makes no difference whether the railroad is a corporation chartered and existing in the State of Illinois, or a foreign corporation so constructed and operated as to be of commercial benefit to the municipality voting the aid, as in the case now before the court.

84 Ill. 410 *supra*, and cases cited.

The case above and those cited therein settle this question beyond any hope of dispute, and discussion of it is unnecessary.

Hoping we have not exhausted the patience of the court by this prolonged discussion, nor abused too much the indulgence of our brothers, Marsh & McFadon, we submit that the court will agree that the certified questions were properly decided, and so order.

JAMES GRANT & WHIT. M. GRANT,
for Defendant in Error.

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17-840
OFFICE SUPREME COURT U.S.
FILED
DEC 26 1882
JAMES H. McKENNEY, Clerk

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1882.

CITY OF QUINCY, *Plaintiff in Error*,

vs. } No. 1043.

MARY COOKE, *Executrix of Lyman Cooke, deceased, Defendant in Error.*

ERROR TO CIRCUIT COURT OF UNITED STATES FOR SOUTHERN DISTRICT OF ILLINOIS.

Statement, Brief and Argument of Defendant in Error.

WILLIAM MARSH,
WILLIAM McFADON,
Attorneys for Defendant in Error.

STATUTES OF ILLINOIS CITED IN FOLLOWING BRIEF.

I.

An act approved and in force March 27th, 1869, entitled:

"An act to legalize the acts of the City Council of the City of Quincy, "Illinois, subscribing to the capital stock of the Mississippi and Missouri "Air Line Railroad Company."

SECTION 1. "Be it enacted by the people of the State of Illinois, "represented in the general assembly, that the acts of the City Council "of Quincy, from June 2d, A. D. 1868, to August 28th, A. D. 1868, in "ordering an election on the proposition to subscribe the sum of one hun- "dred thousand dollars to the capital stock of the Mississippi and Mis- "souri River Air Line Railroad Company, and the subscription to said "stock, and all other acts of said Council in connection therewith, are "hereby legalized and confirmed."

SECTION 2. "This bill shall be in force from and after this passage." (R. p. p. 91. 92.)

II.

A law approved and in force February 16th, 1857, is as follows: (R. 86. 87.)

"An act supplemental to an act entitled an act to reduce the law in- "corporating the City of Quincy, and the several acts amendatory "thereof, into one act and to amend the same"

SECTION 1. "Be it enacted by the people of the State of Illinois, "represented in the general assembly, that the City Council of the City "of Quincy, Illinois, be and is hereby authorized and empowered (any- "thing contained in the act to which this is a supplement notwithstand- "ing) to issue city bonds *to any amount, not exceeding at one time, in "the aggregate, the sum of seventy-five thousand dollars*, and not bear- "ing a rate of interest higher than eight per cent. per annum, the "interest to be paid annually or semi-annually, at the option of the said "City Council."

SECTION 2. "This act shall be deemed a public act, and be in force "from and after its passage."

III.

The next provision of law is this:

The City Council of Quincy has power "to appropriate money and provide for the payment of the debt and expenses of said city." (R. 87.)

SUPREME COURT

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OCTOBER TERM, A. D. 1882.

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ERROR TO CIRCUIT COURT OF UNITED STATES FOR SOUTHERN DISTRICT OF ILLINOIS.

Statement, Brief and Argument of Defendant in Error.

STATEMENT OF CASE.

This suit is upon coupons detached from bonds issued by the plaintiff in error during the year 1870, the validity of which is now denied by said plaintiff in error.

The declaration contains special counts upon the coupons sued on as also the common counts.

On July 2d, 1870, a new constitution of Illinois went into effect, but as the coupons in suit save one, were detached from bonds issued and delivered prior to July 2d, 1870, the questions arising in the case at bar, except perhaps as to that one coupon, are to be determined by and under the constitution of 1848. As even the bonds of the series, issued after July 2d, 1870, were issued in payment of a subscription to railroad stock, fully authorized, as we claim by law, and made prior to the date last aforesaid, we think said new constitution has nothing to do with any of the coupons so sued on in the case at bar.

Each coupon sued on is detatched from a bond, which contains a recital "This bond is issued under and by virtue of an order of the city council

of said City of Quincy, passed August 7th, A. D. 1868, and of an act of the General Assembly of the State of Illinois, entitled 'An act to legalize the acts of the city council of the City of Quincy in subscribing to the capital stock of the Mississippi and Missouri River Air Line Railroad Company,' approved March 27, 1869, etc." (Record p. 95. Printed record p. 36.)

Said act of March 27th, 1869, legalizes and confirms: (Record p. 91. Printed Record p. 35.

1stly. The acts of the city council of the City of Quincy from June 2d, A. D. 1868, to August 28, A. D. 1868, in ordering an election on the proposition to subscribe $100,000 to the capital stock of the Mississippi and Missouri River Air Line Railroad Company.

2ndly. The subscription of the said city itself to said capital stock.

3dly. All other acts of said council in connection therewith.

Said Railroad Company was and is a corporation of the State of Missouri, having its road wholly in that State, but with its eastern terminus at West Quincy, Missouri, on the Mississippi river, opposite said City of Quincy, (the plaintiff in error), but running its trains into said City of Quincy over a bridge spanning the Mississippi at that point. (Record p. 92. Printed Record p. 35.

To understand what the necessity of said validating act of March 27th, 1869, was, and what acts of said city council were thereby validated, it is necessary to review what had been done by the city council of plaintiff in error, prior and antecedent to the passage of said act by the legislature of Illinois.

On June 9th, 1868, without any law therefor, the city council of plaintiff in error ordered an election to be held on June 27th, 1868, at the usual places of voting, at which time and place should be submitted the proposition of authorizing the City of Quincy to subscribe $100,000 to aid in the construction of a railroad northwesterly connecting Quincy with the Missouri Air Line Railroad, payable in bonds of city bearing six per cent. annual interest and running 30 years, upon condition that Lewis County, Missouri, subscribed an equal amount, and upon further conditions that no bonds should be issued in payment of said subscription until $50,000 should have been first expended in grading, bridging and tieing the road, commencing at West Quincy, to a distance not exceeding 25 miles, and that guarantees be given to the city before issuing said bonds, that all proceeds of such bonds should be expended in construction of said road from West Quincy within 25 miles thereof, the city council to determine on the compliance with said conditions and issue bonds in payment of said subscriptions. (Record p. p. 87, 88. Printed Record p. 33.)

Pursuant to said order of said city council an election was held June 27th, 1868, and 651 votes were cast for and 198 votes against said subscription. (Record p. 88. Printed Record p. 34.)

On August 7th, 1868, the city council of Quincy passed an ordinance empowering and directing the Mayor of Quincy to subscribe $100,000 to the capital stock of the Mississippi and Missouri River Air Line Railroad company, payable in bonds of said city, bearing 6 per cent. interest, running 30 years, and upon the conditions mentioned in the resolutions of the said city council submitting the aforesaid proposition to vote. (Record p. p. 89, 90. Printed Record p. 34.)

Pursuant to said last named ordinance, on August 8th, A. D. ~~1869~~ 1868, said city of Quincy by its then Mayor, subscribed in the sum of $100,000 to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, upon the conditions named in said ordinance, payable in bonds of said city, running 30 years and drawing 6 per cent annual interest. (R. 90. Printed Record p. 34.)

The bonds of said city in payment of said subscription were issued by Quincy's city council in three installments during the year 1870, each bond being for $500. Bonds numbering from 1 to 50 inclusive were issued and delivered to said company January 1st, 1870. Bonds numbered from 51 to 125 inclusive were issued and delivered to said company on May 18th 1870, and those numbered from 126 to 200 inclusive were so issued and delivered on November 12th, 1870. The city received for each installment of bonds so delivered an equal amount of the capital stock of the said railroad company reckoned at the par value of $100 each share, (Record p. 93. Printed Record p. 35,) on which said shares said city of Quincy voted at one or more meetings of stockholders of said railroad company, and for six years paid the successive annual installments of interest on the 200 bonds issued to said company. (Record p. p. 97, 98. Printed Record p. 37.)

The bonds from which the coupons sued on are detached are valid and the coupons themselves are consequently valid, provided the validating act of March 27th, 1869, is a valid law, and said act is clearly a valid law, unless it be obnoxious to some constitutional objection arising under the constitution of Illinois of 1848, and if said law be obnoxious to any such constitutional objection, it must be upon one or other of the following assumptions:

1stly. That under said constitution of 1848, the city council of a city could not be empowered by the legislature of Illinois to subscribe to the capital stock of a railroad company without a prior vote of the electors of such city authorizing such subscription.

2ndly. That under the said constitution of 1848, provided such prior election was necessary, it was not constitutional for the legislature to validate an antecedent vote of the electors of such city held without the authority of law.

3dly. That the passage of an act by the legislature of Illinois to validate a prior voluntary subscription by a city to the capital stock of a railroad company, made without authority of law, was invalid as creating a debt without the consent of the municipal authorities.

4thly. That the subscription by a city located on the western edge of Illinois, to the capital stock of a railroad corporation of the State of Missouri, having its railroad wholly in Missouri, is not a corporate purpose within the meaning of said constitution of 1848, though said foreign corporation has, as is the fact in the case at hand, its eastern terminus on the opposite bank of said river, and ruus its trains regularly into such city over a bridge at that point.

Upon these four propositions we expect the authorities to develop the law to be as follows:

1stly. That the subscription was for a corporate purpose.

2ndly. That the validating act was and is not obnoxious to the objection that a debt is thereby created against the City of Quincy, without consent of its authorities.

3dly. That under the constitution of 1848, the legislature could confer the authority to subscribe to the capital stock of a railroad company directly upon the city council of a city, without any need of the submission of the question of making such subscriptions to a vote of the electors of said city, and that such being the case, the validating act of March 27th, 1869, validated the subscription mentioned in said act, and it is wholly immaterial to the decision of this case, whether the election in said act mentioned was thereby made valid or not.

We belive that all the assignments of error by plaintiff in error and all the questions appearing in the certificate of division may be consolidated and made to fall under the four heads just above propounded by us.

Of course we shall insist that the questions themselves shall be solved in the light of the decisions of the courts of Illinois as they stood at the time the said bonds were issued, and that if up to said time, the courts of Illinois remained silent upon any of said questions, that the Supreme Court of the United States is at liberty to follow and should follow its own decisions upon such questions.

We shall finally insist that the defendant in error's intestate having been a bona fide purchase for value of the coupons sued on as well as the bonds from which they were detached, (Record p. 97. Printed Record p. 37), their validity can be sustained under the act of February 16th, 1857, authorizing the plaintiff in error to issue bonds to an amount not exceeding $75,000 at any one time, (Record p. p. 86, 87. Printed Record p. 33), and for the reasons aforesaid urge an affirmance of the judgment below.

WILLIAM McFADON,
WILLIAM MARSH,
Attorneys for defendant in error.

BRIEF.

I.

In the case of such a municipality as an *incorporated city*, it was not, under the Illinois constitution of 1848, necessary that the question of subscribing to the stock of a railroad company be first submitted to a vote of the electors of such city. The legislature of that state could confor the power to make such subscription directly upon the municipal authorities.

Keithburg vs. Frick, 34 Ill., 421.

Marshall vs. Silliman, 61 Ill., 225.

Q. M. & P. R. R. Co. vs. Morris, 84 Ill., 410.

Williams vs. Town of Roberts, 88 Ill.. ~~211~~. 2 /.

County of Jasper vs. Ballou, 103 U. S., 751.

Roberts vs. Bolles, 101 U. S., 126.

County of Livingston vs. Darlington, 101 U. S., 415.

Unless, therefore, the validating act of March 27th, 1869, be open to some constitutional objection, said act validated and made legal the subscription of the City of Quincy to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, made August 8th, 1868, even though it did not validate the election in said validating act mentioned,

Q. M. & P. R. R. Co. vs. Morris, 84 Ill., 415.

and, the question of whether said validating act legalizes the election therein mentioned is not material to the decision of this case.

II.

The subscription by the City of Quincy, to the capital stock of said railroad Company, was under the facts of this case a subscription for a corporate purpose, and has been decided to be such both by the State and the Federal Courts.

Railroad Co. vs. County of Olto, 16 Wall, 667.

Q. M. & P. R. R. Co. vs. Morris, 84 Ill., 419, and cases cited.

III.

a.

We come now to the question of whether the legislature of Illinois, under its constitution of 1848, could constitutionally legalize and validate an antecedent voluntary subscription by a city to the capital stock of a railroad company:

Upon this point we insist that the rights of the defendant in error are to be determined by the decisions of the Supreme Court of Illinois, as they stood at the time said validating act was passed, i. e. March 27, 1869, for then it was that the status of the city's subscription was fixed as creating a valid contract with the railroad company or not; but in any event the rights of defendant in error are to be determined by said decisions as they stood when the bonds were issued, that is to say in 1870.

Douglass vs. Pike County, 101 U. S., 686.

Rowan vs. Russell, 5 How., 134.

The City vs. Lamson, 9 Wall, 485.

If the decisions of the Illinois courts have changed since the said validating act was passed or since said bonds were issued, this Court will not follow such later decisions to the prejudice of rights acquired under earlier decisions of the same courts.

Rowan vs. Runnels, 5 How., 134.

Gelpcke vs. Dubuque, 1 Wall, 205.

Douglas vs. Pike County, 101 U. S., 687.

County of Livingston vs. Darlington, 101 U. S., 414.

b.

Under the decisions of the Supreme Court of Illinois, as they stood as late as the time of the issue of the bonds in controversy, the legislature of that State could validate an antecedent voluntary subscription by a city to the capital stock of a railroad company.

The President, etc., of Keithsburg vs Frick, 34 Ill., 421.

Cowgill vs. Long, 15 Ill., 203.

And such was the understanding of this Court of the earlier decisions of the Supreme Court of Illinois.

St. Joseph Township vs. Rogers, 16 Wall, 663.

As to the general power of the legislature to pass validating acts, see

U. S. Mortgage Co. vs. Gross, 93 Ill., 494.

c.

But if it should claimed that The President, etc, of Keithsburg vs. Frick, 34 Ill., 421, was not a direct adjudication as claimed by us above, then we say that no decisions had been made by the Supreme Court of Illinois upon the constitutionality of a subsequent act validating a prior subscription by a city to the stock of a railroad company, prior to the issue of the bonds involved in this suit, and this court will, under such circumstances, follow its own decisions upon such question,

Butz vs. Muscatine, 8 Wall, 584,

Supervisors vs. United States, 18 Wall, 82,

and this court has uniformly held that such validating acts are constitutional.

See St. Joseph Township vs. Rogers, 16 Wall, 663, where in an Illinois case, this court held argument on such a question was unnecessary, as the question was no longer an open one.

Also Thompson vs. Lee County, 3 Wall, 328.

Ritchie vs. Franklin County, 22 Wall, 76.

Campbell vs. City of Kenosha, 5 Wall, 194.

The City vs. Lamson, 9 Wall, 485.

Thompson vs. Perrine, 103 U. S., 806.

The principle of these cases being that subsequent ratification by a legislature of an unauthorized subscription is equivalent to original authority to make the same.

VI.

But we insist that, in so far as the higher grades of municipalities, such as cities and incorporated towns, are concerned, the later decisions of the Supreme Court of Illinois are not inconsistent with the earlies ones in regard to the validity and effect of curative acts of legislation.

By the decisions of that court a wide distinction has always been made and maintained, between the cases of cities and other incorporated municipalities having a governing body, such as a city council, elected as the representative of the electors of such city, and the cases of towns and the other lower political sub-divisions of the state, which have no intermediate body to represent the electors, and where consequently there is no body authorized to represent the electors in the matter of giving assent to the creation of a debt but the electors themselves.

In the latter cases, (the cases of towns, etc.), the assent of the electors can only be given at an election called and held according to law, and when an election is not so called and held, the electors are under no obligation to attend and vote, upon the question of creating a debt, and consequently it cannot be predicated of such illegal election, that the consent of the electors has been thereat given to the creation of a debt, nor can the want of such assent be obviated or cured by a validating act of the legislature.

Marshall, *et al*, vs. Silliman, 61 Ill., 218.

Wiley vs. Silliman, 62 Ill., 170.

Williams vs. Town of Roberts, 88 Ill., ~~170.~~ 17.

And other cases cited by plaintiff in error on page 11 of his brief are of this character, (and as showing that we interpret these cases rightly we cite Harter vs. Kornochan, 103 U. S., 570.)

But that the rule of the last mentioned cases does not govern in the case of cities is held in

The President, etc., of Keithsburg vs. Frick, 34 Ill., 421,

and reiterated in

Williams vs. Town of Roberts, 88 Ill., 21,

and where bonds have been voluntarily issued as in the case at bar—is affirmed in

Cairo & St. Louis R. R. Co vs. City of Sparta, 77 Ill., 505,

and other Illinois cases recognizing the differences between cities and the other political divisions of the State in the particular now under consideration are

Marshall vs Silliman, 61 Ill., 225.

Q. M. & P. vs. Morris, 84 Ill., 410.

Schaeffer vs. Borham, 95 Ill., 382.

Chicago, Burlington and Quincy R. R. Co. vs. City of Aurora, 99 Ill., 210.

Roberts vs. Bolles, 101 U. S., 127.

And where as in the case in hand a city has in the first instance voluntarily subscribed to the capital stock of a railroad company, and the legislature has then validated that voluntary subscription—and after the passage of such validating act such city has voluntarily issued its bonds in payment of such voluntary subscription—we think the case so squarely covered by the facts and the decision in

The President, etc., of Keithsburg vs. Frick, 34 Ill, 421,

that it can not be contended that the validating act is bad as creating a debt against a city without the consent of its corporate authorites.

V.

But upon the question of the validating act creating a debt against a city without the consent of its corporate authorities, it is to be remembered that the validating act of 1869 was passed in the days of special legislation in Illinois, and it is a fair presumption that such act was only passed at the request of the corporate authorities of Quincy.

Moreover the after voluntary acts of the City Council of Quincy:

1stly. In issuing bonds after the passage of said validating act in compliance with the said original subscription, and accepting the stock of said railroad company in exchange therefor.

2dly In voting upon said capital stock at the corporate meetings of said company.

3dly. In paying interest for several years upon the bonds, were an after ratification, by the city itself, of said validating act, and removed the objection to said validating act (if any such otherwise existed) as creating a debt without the consent of Quincy's corporate authorities.

Knapp vs. Grant *et al.*, 27 Wis., 147.

Mills vs. Gleason, 11 Wis., 470.

Barrett vs. County of Schuyler, 44 Mo., 198.

And these decisions in Wisconsin have special force, in the case at bar, because the courts of that State hold that a debt cannot be fastened by the legislature upon a city without its consent.

Cooley Const. Limit, 3d ed., * 231.

Moreover under the case of

Cairo & St. Louis R. R. Co. vs. City of Sparta, 77 Ill., 505,

(a case of validating act where no subscription had been made by the city), the validating act, of 1869, at least empowered Quincy to issue the bonds sued on, and the city having voluntarily issued them, they will be sustained.

VI.

As to the one coupon, detached from a bond, dated July 1st, 1870, before the constitution of 1870 took effect, though, in fact, issued afterwards, we say that the separate clause of the constitution, of 1870, relied on, is without force. The subscription, in question in this suit, having already been made, to-wit: in August, 1868, and being validated in March, 1869, became and was already obligatory and binding upon the city. as a contract with the railroad company, when the new constitution of 1870, went into effect, and could not be impaired by the adoption of that constitution.

County of Moultrie vs. Savings Bank, 92 U. S., 63[illegible]

and the city was bound to carry out the contract created by said subscription, and to issue its bonds in accordance with the terms thereof, until said contract was completed, notwithstanding the going into effect of said new constitution of 1870, and this is all said city did do. All its bonds issued in payment of said subscription are therefore valid.

VII.

But if the bonds in suit could be sustained in no other way, their issue was authorized under the act of February 16th, 1857. (Record, pp. 86-87. Printed Record, p. 33).

City of Quincy vs. Warfield, 25 Ill., 317.

Meyer vs. Muscatine, 1 Wall, 384.

Rogers vs. Burlington, 3 Wall, 654.

A purchaser of bonds especially if *bona fide* for value before maturity vs was the original plaintiff below, (Record p. p. 86, 87), may appeal to any law in existence at the time of their issue, to sustain their validity.

Gelpcke vs. City of Dubuque, 1 Wall, 203.

Supervisors vs. Schenck, 5 Wall, 784.

and the fact that the recitals refer to some other law than the right one, as the source of authority, does not change the question.

Commissioners vs. January, 94 U. S., 205.

WILLIAM McFADON,
WILLIAM MARSH,
Attorneys for defendant in error.

ARGUMENT.

The certificate of division shows that the judges trying the case below, were divided upon the question as to whether the validiting act of March 27th, 1869, had the effect to legalize the election held June 27th, 1868, under an order of the city council of Quincy, to vote upon the proposition of subscribing $100,000 to the capital stock of the road in said proposition mentioned. (Record p. 98, Printed Record p. 37.) The second of the assignments of error is that the court erred in holding that said act, had the effect to legalize said election. But we assert that to sustain the judgment below, it was not necessary for the court to have held, and it can not be said that the court did hold, that said validating act legalizes said election. Inasmuch as the acts we are reviewing are those of a city, we assert that the question of whether the said act legalized said election or not was a wholly immaterial one, and that the liability of the city in this case in no way or manner hinged upon the question of whether said election was legalized or not by said act.

That this view is correct is shown by the decision of the Supreme Court of Illinois in

Quincy, Missouri and Pacific Railroad Company vs. Morris, 84 Ill , 410.

The question under consideration in that case grew out of a provision of the new constitution of 1870, which saved to the legislature of Illinois the right to authorize the City of Quincy to create a certain indebtedness, voted by the people of that city prior to December 13th, 1869, with this proviso, that the General Assembly should have no power in the premises that it could not exercise under the constitution of 1848.

The question then of the right of the legislature to authorize the creation of the indebtedness in question in the case last cited, stood then, precisely as it was left under the constitution of 1848, and the decision of that case must therefore govern the case at bar. In that case as in the case at bar, an election had been held without being required by law, to vote upon the question of subscription to the stock of a railroad. The legislature of Illinois by an act which went into effect July 1st, 1871, validated said election and authorized a subscription to be made by the City of Quincy to the capital stock of the Quincy, Missouri and Pacific Railroad Company in accordance with the vote at said election.

The Supreme Court of Illinois decided in that case that inasmuch as the legislature of Illinois, under the constitution of 1848, could confer the power to subscribe to the capital stock of a railroad company upon the city council of a city, without a vote of the people being necessary, the validity of the subscription made under said act of July 1st,

1871, did not depend upon that part of the act of July 1st, 1871, validating said election, and the question of whether said election was thereby validated was deemed by the court immaterial in the case, and was not considered by the court.

That the power to subscribe to the capital stock of a railroad could be conferred directly upon the *city council of a city* has been held by the Supreme Court of Illinois without deviation.

The President, etc., of Keithsburg vs. Frick, 34 Ill., 421.

Marshall vs. Silliman, 61 Ill., 225.

Q. M. & P. R. R. Co. vs. Morris, 84 Ill., 410.

Williams vs. Town of Roberts, 88 Ill.. 21.

County of Jasper vs. Ballou, 103 U. S., 751.

Roberts vs. Bolles, 101 U. S., 126.

County of Livingston vs. Darlington, 101 U. S., 415.

Such being the law of Illinois we insist that it is unnecessary to consider, and the liability of the plaintiff in error, is in no manner dependent upon the question as to whether the said validating act of March 27th, 1869, did or did not validate the election therein referred to.

II.

The 11th assignment of errors raises the question as to whether the purpose for which the bonds were issued, from which the coupons in suit were detached, was a corporate purpose.

We suppose that it will not be seriously contended at this late date, that the subscription, by a city, to the capital stock of a railroad company, is not for a corporate purpose.

We infer that the assignment of error, last mentioned, is intended to raise the question as to whether the particular subscription, in controversy in this suit, is for a corporate purpose, or not.

The subscription in controversy was made by Quincy, a city situated on the east bank of the Mississippi river, to the capital stock of a Missouri corporation, having the eastern terminus of its road opposite Quincy, and its road wholly in Missouri. Said corporation runs, and has always, since its road began to be built, run its trains into Quincy, over a railroad bridge spanning the river at that point. (R. 92. Printed Record, p. 35).

As the Supreme Court of Illinois held in the case of another subscripscription, by this same City of Quincy, to the capital stock of a Missouri corporation, that the purpose was a corporate one.

Q. M. & P. R. R. Co. vs. Morris, 84 Ill., 417,

and as the Supreme Court of the United States in

Railroad Co. vs. County of Otto, 16 Wall, 676,

has decided the same question, the same way. We do not see how this question can be longer deemed an open one.

That the purpose of the subscription in question in this suit was a corporate one, cannot be questioned.

III.

It appears from the record that the City Council, of Quincy, on August 7th, 1868, by ordinance, voted that the City of Quincy subscribe $100,000.00 to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, payable in the bonds of said city running 30 years, and bearing six per cent. interest annually, subject to certain conditions, in said ordinance mentioned.

The mayor of said city was directed to make said subscription, in the name of said city, and did so August 8th, 1868. (R., pp. 89-90). We have then, as the basis of our investigation, a subscription voluntarily made, by said city, possibly without antecedent authority, to the capital stock of a railroad company. This voluntary subscription was legalized by the act of March 27th, 1869, (R., pp. 91-92. Printed Record p. 35), and the question growing out of this validating act is, whether under the constitution of Illinois, of 1848, the legislature of that state could constitutionally legalize a voluntary subscription, by *a city*, to the capital stock of a railroad company, made without legislative authority, or whether such validating act is open to the constitutional objection that a debt is thereby created against Quincy without the consent of its corporate authorities.

In the discussion of this branch of the case, we are to ask, how stood the decisions of the Supreme Court of Illinois, on March 27th, 1869, when said validating act was passed, and how did they stand in 1870, when the bonds were issued and delivered, by said city, in payment of said subscription ?

Cowgill vs. Long, 15 Ill., 202, had decided that a validating act might be constitutionally passed to secure the collection of taxes defectively levied.

In 1864—in

The President, etc., of Keithsburg vs. Frick, 34 Ill., 405,

the Supreme Court of Illinois declared in effect that if a town subscribed to the stock of a railroad and issues it bonds therefor without authority so to do, still it is competent for the legislature to legalize and declare valid what the town may have done in this regard.

It appears from the report of the case that in the town of Keithsburg, while said town was organized under the general law of Illinois, and on November 4th, 1855, assuming to act under the authority of the railroad law of 1849, an election had been held to vote upon the question of subscribing $20,000 to the capital stock of the Warsaw and Rockford Railroad company, and a subscription had been made pursuant to said vote, by said town to said stock. Later a special charter was conferred upon said town by a law of the legislature of Illinois, passed February 16th, 1857, the 17th section of which was as follows:

"The subscription heretofore made by said corporation to the capital "stock of the Wabash and Rockford Railroad Company, of a sum not "exceeding $20,000, to be paid for in town bonds * * * is "hereby legalized and confirmed to the full extent, and for the purposes "for which such subscription was made." The section then empowered the president of said corporation to execute and issue said bonds

It was on the other hand contended that the subscription was made not under said law of 1849, but under the 2nd Section of the special charter of February 16th, 1857.

The Supreme Court in the case last cited, say:

"But if the subscription was made under the organization allowed by "the general incorporation law of 1849. the seventeeth section of the act "of 1857, legalizes and confirms it. The subscription was therefore "good if made under the act of 1857, as an original subscription under "the second section, *or as a subscription made under the act of* 1849, "*confirmed as it is, by the seventeenth section of the act of* 1857. The "bonds may be regarded as issued by the old corporation confirmed by "the new act, or as a new issue under the second section of the act of 1857."

In the above case the court holds that a prior vote of the people was not a necessary element of subscriptions to railroad stock in case of an incorporated town or city, and that the power to subscribe might be conferred directly on the corporation without any intermediary.

In the case last cited, a vote had been taken and a subscription made prior to the passage of the validating act, while the bonds were not issued till after its passage. The facts of said case are so nearly identical with those of the case at bar, that said decision must, we think, be of controling force in determining the case at bar.

In the case last cited, we have a declaration by the Supreme Court of Illinois, as late as 1864, that curative acts in the case of cities and incorporated towns were constitutional; and we insist that up to the time of the passage of the validating act of March 27th, 1869, and in fact up to the time of the issue of the bonds in controversy in this suit in 1870, no other decision of the Supreme Court of Illinois touched upon that question, and that consequently as the decision of Illinois stood when said validating act was passed, as also when said bonds were issued, curative acts of the kind in controversy in this suit were constitutional and valid.

Are we right in saying that no other decision of said Supreme Court of Illinois after that of The President etc. of Keithsburg vs. Frick, 34 Ill., and up to the passage of said curative act of 1869, and in fact up to the year 1870, when said bonds were issued, touched upon the question of curative acts in the case of cities? Let us consider the cases cited by counsel for plaintiff in error upon this point.

The brief of plaintiff in error points us to certain cases in the 51st and 53d Illinois Supreme Court Reports, as having intervened between the

said case of Keithsburg v. Frick, 34 Ill., and the passage of said validating act and the date of the issue of said bonds.

The first of these cases is Harwood vs. St. Clair Drainage Co. 51. Ill. 135, but that case merely decides that the power to tax can not be conferred on other than corporate authorities, and that drainage commissioners are not corporate authorities.

The next of these cases is The People vs. Mayor etc. of Chicago, 51 Ill., 17, where it was held that "park commissioners were not the 'corporate authorities,'" and hence that such officers could not fasten a debt upon the city of Chicago.

The next of these cases is The people *ex. rel.* vs. City of Chicago, 51 Ill., 58, where the question at issue is the same as that in the case last cited.

The People *ex. rel.* vs. Salomon, 51 Ill., 37, the next of the cases cited by plaintiff in error, is a case of like kind with the three last cited cases, involves the acts of park commissioners and in no manner touches upon the question of the constitutionality of a validating or curative act.

The last few cases being those cited from the 51st volume of the Illinois Supreme Court Reports, were decided at the June Term 1869 of said Supreme Court, all being decided after the passage of said validating act, and after the status of the subscription validated by said act, had been settled by and upon the decision of the Keithsburg case in the 34th Ill. Reports. The volume in which these cases appear was not published until 1871.

The cases cited by plaintiff in error from the 53d Illinois Reports were not tried until the January Term 1870 of said court. They are Hessler vs. Drainage Commissioners, 53 Ill., 106, where the question was again decided that Drainage Commissioners were not corporate authorities, and Lovingston vs. Wider, 53 Ill., 302, where the question decided was that Police Commissioners were not corporate authorities. The 53d volume of said Supreme Court Reports was not published until 1871.

We understand these cases from the 51st and 53d Illinois, as turning upon the question, of who were and who were not corporate authorities, and in no manner deciding whether an act of the legislature of Illinois validating a previous voluntary subscrsption by a city to a Railroad Company, made without legal authority, was unconstitutional as creating a debt without the consent of Quincy's corporate authorities, and, as in speaking of certain decisions of the Supreme Court of Illinois, cited to this court, this court in Harter vs, Kernochan, 103 U. S., 570, say: "Some "of these cases turn upon the inquiry as to who are, in the sense of the "constitution, corporate authorities of counties, cities and towns, etc., "and what are corporate purposes," we believe this court has understood the said cases as we do.

The next case cited by plaintiff in error is Marshall vs. Silliman, 61 Ill., 218, a case not decided till September, 1871, or long after the bonds in controversy in this suit were issued and delivered, and even in this very case, Town of Keithburg vs. Frick, 34 Ill., 420, was approved.

We therefore assert that in the case of President etc. of Keithsburg vs. Frick, 34 Ill., 420, was to be found the last expression of the Supreme Court of Illinois, prior to the delivery of the bonds involved in this suit, upon the question of the validity of an act of the legislature, validating an antecedent voluntary subscription by a city to the capital stock of a railroad company made without authority of law.

This case declared the validity of such a law, and accordingly we assert such to have been the law of Illinois at the time the bonds in question in this suit were put upon the market, as also at the time said validating act was passed.

That this court so understood the law to be in Illinois, at the time last mentioned, is shown by their opinion in St. Joseph Township vs. Rogers, 16 Wall, 663, (a case of an Illinois township,) in which opinion this court say:

"Argument to show that defective subscriptions of the kind may in "all cases be ratified, where the legislature could have originally conferred "the power, is certainly unnecessary, as the question is authoritatively 'settled by the decisions of the Supreme Court of the State, and of this "court in repeated instances," this court referring in support of its conclusions to the Keithsburg case *supra*. In this case of St. Joseph Township vs. Rogers, 16 Wall, 663, an election had been held in the township without authority of law. The same was validated by an act of the legislature, and although the validating act made the subscription by the township imperative, this court upheld the bonds issued in payment of said subscription.

In view of this last decision, made as it was in 1872, are we not justified in asserting that this court has decided that under the decisions of the Supreme Court of Illinois, as they stood in 1870, when the bonds in controversy in this suit were issued, the validating act of March 27th, 1869, was constitutional? Certainly upon the decision of this court, last cited (16 Wall, 666), if plaintiff in error had defaulted on coupons from the same bonds involved in this suit as they fell due in 1871 and 1872, instead of defaulting at a later date—and suit had been brought in 1872—the decision of this court must have been just as was the decision of the court below, in the case at bar: i. e. in favor of the validity of the bonds and against the plaintiff in error.

That the Supreme Court will hold that the rights of the defendant in error are to be determined by the law of Illinois as declared by its Supreme Court, at the time said validating acts was passed or said bonds issued—needs no further reference to authority than is contained in our brief.

But should it be contended that the case of The President, &c., of Keithsburg vs. Frick, 34 Ill., *Supra*., was not a direct adjudication, upon the question of the validity of a curative act, validating an antecedent voluntary subscription by a city to the capital stock of a railroad company,

made without legal authority, we answer that then in such event, there had been no decisions of the Supreme Court of Illinois upon the subject when said validating act was passed and said bonds issued, and the Supreme Court of the United States will in such case follow its own decisions upon the subject of validating acts, and the decisions of this Court are uniformly in favor of the validity of such acts.

In support of this proposition we deem it only necessary to refer to St. Joseph Township vs. Rogers, 16 Wall, 663,

and the other cases of this court, cited under the third point of our brief.

IV.

But we are far from admitting that there is any conflict between the earlier and later decisions of the Supreme Court of Illinois *in so far as cities are concerned*, upon the question of the constitutionality of validating acts.

We assert that no case decided by that court can be found, holding under the constitution of 1848 that where *the city council of a city voluntarily subscribed to the capital stock of a railroad* company without legal authority and the legislature had afterwards validated such subscription, a debt was thereby created by the legislature against such city without the consent of its corporate authorities.

On the contrary we assert that the law as declared in "The President, etc., of Keithsburg vs. Frick, 34 Ill., 420," with reference to the validity of validating acts is the law of Illinois to-day in so far as cities are concerned, and that this was recognized as being the case in as late a report as the 88th Illinois Supreme Court Reports.

In Williams vs. Town of Roberts, 88 Ill., 21, it is said:

"County boards, such as boards of supervisors, county commissioners, "and the municipal authorities of incorporated cities, towns and villages, "may, when empowered so to do by proper legislation, subscribe to the "capital stock of railroad corporations without first submitting the question "to the electors of the municipality. They are elected as representatives "of the electors, and theoretically, in appropriate cases, their acts are the "acts of those they represent. Hence it has been held, where a vote of "the electors has been required as a precedent condition to the making of "a subscription for stock in a railroad company, and the law prescribing "the mode of calling and holding the election has not been observed, in- "asmuch as the legislature might have empowered the municipal author- "ities to make the subscription without first submitting the question to the "electors, it may by a subsequent enactment, declare the non-compliance "with the law in the holding of the election of no consequence, and val- "idate the subscription—in other words, validate the subscription without "reference to the election. This however, it will be observed is upon the "theory that power to make the subscription does not in any degree nec- "essarily depend upon a vote of the electors of the municipality upon "that question, but solely upon the will of the legislature."

What is this but a reiteration as to cities, in the 88th Illinois Reports of the doctrine of Keithsburg vs. Frick case, 34 Ill., so often above cited.

The doctrine of the case of Keithsburg vs. Frick, 34 Ill., 405, has been recognized in one way or another in the following cases:

Marshal vs. Silliman, 61 Ill.. 225.

Wiley vs. Silliman, 62 Ill., 170.

Quincy, Missouri & Pacific R. R. Co. vs. Morris, 84 Ill., 410.

Schaeffer vs. Bonham, 95 Ill., 382.

Chicago, Burlington & Quincy R. R. Co. vs. Aurora, 99 Ill., 210.

Roberts vs. Bolles, 101 U. S., 127.

County of Livingston vs. Dailington, 101 U. S., 415.

The cases in the Illinois Reports, as to cities, are harmonious upon the subject of validating acts.

The cases in the Illinois Reports later than the 34 Illinois, which have denied the constitutionality of validating or curative acts under the constitution of 1848, have been rendered in the case of towns, townships and the lower grades of political sub-divisions of the state—not in the higher grades of municipalities such as cities, and the reasoning of such cases is wholly inapplicable to the cases of cities. The grounds upon which validating acts have been held invalid in the former class of cases, is that under the peculiar organization of such towns or townships, there was no officer or officers authorized to represent the electors, as the city council of a city represents the electors of such city; that consequently there was no one authorized to represent the electors but the electors themselves. As a consequence of there being no one to represent the electors of a town or township but the electors themselves, no one could authorize or consent to a subscription by such town or township, to the capital stock of a railroad company, but the electors themselves, and under the decisions of the of the Supreme Court of Illinois, such electors can only act when called together in obedience to law, that is, at a legally called and authorized meeting. They are under no obligation to attend and vote at a meeting not authorized by *or called* according to law, and hence the necessity of a valid election as a condition precedent to a binding subscription by a town or township in Illinois. If there be no such prior valid election upon the question of subscription—the consent of the electors—the only corporate authorities in such cases, is wanting; and any subscription made by such town or township to the capital stock of a railroad company, lacks the consent of the proper corporate authorities thereto, and is not binding for want of such consent. Hence if the legislature has passed an act validating such subscribtion and the election on which it was based, and such subscription has become binding on such town or township—it has become binding as is held by the Supreme Court of Illinois, as a result of an act of the legislature and without consent of its corporate authorities—and it is the legislative act which has created the debt against the municipality.

It is easy to see that in such cases a debt is by legislative enactment, and not by the consent of the corporate authorities, created against a town or township, and the validating act is accordingly held unconstitutional.

The following of the cases cited by counsel of plaintiff in error, relate to towns and townships, and are decided on the basis of the reasoning last aforesaid:

Marshall vs. Silliman, 61 Ill., 218.

Wiley vs. Silliman, 62 Ill., 170.

Barnes vs. Town of Roberts, 88 Ill., 11.

Others of these cases cited by plaintiff in error on page eleven of its brief do not seem to us to touch the question in this suit.

The reasons why a validating act is invalid in the case of towns or townships, is that the electors are the only corporate authorities in such cases, and that they can consent to the creation of a debt only at a legally called meeting.

But such reasons have no application to the case of cities By a uniform series of decisions, the Supreme Court of Illnois have held that the city council of city is elected to represent and that it does represent the electors of such city. Those who compose a city council are then the corporate authorities of a city. If the city council of a city consent to make a subscription to the capital stock of a railroad company, no other consent is needed. It can in no way or manner be asserted of such a subscription that a debt is thereby created against a city without the consent of the corporate authorities thereof. That the corporate authorities, by mistake or otherwise have voluntarily made such subscription in advance of the passage of a law authorizing the same to be done, does not change the fact that such subscription when made was voluntary and has therefore received the consent of the corporate authorities. The essence of the transaction is the voluntary action of the corporate authorities, and this is in no manner dependent upon the question of whether the legislative authority to make the same precede or follow the subscription. The finding of facts in this case shows that the city council Quincy did, on August 8th, 1868, voluntarily subscribe to the capital stock of the Mississippi & Missouri River Air Line Railroad Company. That voluntary act, of Quincy's City Council, was ratified and confirmed by the validating act of March 27th, 1869, and by the joint action of Quincy's City Council in making said subscription and the legislature of Illinois, in supplying the power said subscription became binding, and it seems to us an anamoly, if, under the facts of the case in hand, it can be said that a debt was fastened on Quincy without the consent of its corporate authorities.

We believe we have now noticed all the authorities cited by plaintiff in error that can be, by any fair construction, said to come any where near touching upon the validity of a curative act in the case of cities,

unless it be the two we next notice, and we have found that none of them shake the case of Keithsburg vs. Frick, 34 Ill., *supra*.

It is contended that Gaddis vs. Richland County, 92 Ill., 127, is authority against the position we are contending for, but we assert that it is not. The facts in that case show that an election had been held in Richland County, without authority of law, to vote upon the question of whether the county would subscribe $150,000 to the stock of a railroad company, and, at said election, the vote was for subscribing. The election was held under the general law of 1849, and under the decisions of the Illinois Supreme Court upon that law, a vote to subscribe was held to be only advisory as to the supervisors of a county, such supervisors having, notwithstanding, the option to subscribe, or not, as they might see fit.

The People *ex rel.* vs. Tazewell County, 22 Ill., 147.

The People vs. Cass County, 77 Ill., 440.

The board of supervisors, who alone are authorized to represent a county under the Illinois law, and with whom, after such a vote, by the uniform decisions of said court was left the option to subscribe, or not, as they saw fit, had not, in the Richland County case, made any subscription to the capital stock of the said road, (a fact which distinguishes said case from the case at bar), nor voted so to do. Under this state of facts, a validating act was passed by the legislature of Illinois, validating said election, and peremptorily requiring the county authorities to make the subscription, as the opinion of the court says, "although contrary to the judgment and against the will of the members of the board." Here then was a law requiring a subscription, by the corporate authorities of a county, to the stock of a railroad company, and there having been no voluntary action of its corporate authorities in the case, it might well be said that a debt was forced, by the legistature, upon Richland county without its consent. But there is this further distinction between the two cases. The election in the Richland County case, 92 Ill. 122, as we have seen, was under the law of 1849. Under that law, as held in Gaddis vs Richland County, 92 Ill., 122, and in The People *ex rel.* vs. Cass County, 77 Ill., 440, no subscription could be made until sanctioned by a vote of the people of a county. The power to subscribe then did not exist in county officials, independent of a vote of the people, as in the case of a city council of a city. A vote was as much a condition precedent under said law of 1849, as in the case of a subscription by a township, and a vote being necessary, must be given at a legal election, as much in the one case as in the other. The facts being so different from those of the case at bar, the last cited case is no authority in the case now before this court.

The case of The People vs. Jackson County, 92 Ill., 442, cited by plaintiff in error, went off on the prohibitory clause in the new constitution of 1870, and is not authority upon the questions in the case at bar at all.

V.

But the question being, has a debt been created against Quincy, without the consent of Quincy's corporate authorities, we are entitled to appeal to the acts of the City Council of Quincy,, done after the passage of the validatory act of March 27th, 1869, as shedding light upon this question.

In the case of Cairo & St. Louis Railroad Company vs. City of Sparta, 77 Ill., 505, a case decided in 1875, several years after the rights of defendant in error's intestate had been fixed under the earlier decision of the Supreme Court of Illinois, it was decided that a validating act under facts similar to those of the case at bar, at least, gave the power to the city to issue bonds which had been voted, but that, while the city might have authority to issue the bonds, their issue could not be compelled. The proceeding in that case was mandamus.

The vote, upon the proposition submitted at the election, seems to have been treated as amounting to a subscription to the stock of the railroad company whose rights were involved. In the case at bar the City of Quincy formally subscribed to the capital stock of the railroad company, and the case at bar is therefore made the stronger, by reason of that circumstance. On the authority of the case just cited (i. e. Cairo & St. Louis R. R. Co. vs. Sparta, 77 Ill. 506) the validating act gave power to Quincy to issue the bonds in controversy in this suit. While their issue might not have been compelled, if the city chose to issue them voluntarily, the city had the power so to do. In this case as in the Keithsburg-Frick case, 34 Ill, *supra*, the city voluntarily issued its bonds after the passage of the validating act, in payment of the subscription validated by said act, voluntarily received stock of the railroad company in exchange therefor, voted in said stock at corporate meetings of the railroad company and for years paid interest on said bonds. (Record, pp. 93. 97. 98). The bonds issued under the facts aforesaid, were good under the decision last cited, the same having been voluntarily issued after said act was passed, and said act if nothing more, at least, conferred power on plaintiff in error to issue the same.

But, moreover, the acts of Quincy's City Council, done after said validating act was passed, viz.: The voluntary issue of bonds, in payment of the stock subscribed; the receipt of stock in exchange for said bonds; the city's voting on said stock at corporate meetings of said railroad company; the payment of many year's interest on said bonds, were a ratification of said validating act, and removed the objection to said validating act (if any such existed) as creating a debt without the consent of Quincy's corporate authorities.

Fisk vs. City of Kenosba, 26 Wis., 31.

Knapp vs. Grant, 27 Wis., 147.

Mills vs. Gleason, 11 Wis., 151.

Barret vs. County of Schuyler, 44 Mo., 198.

In Knapp vs. Grant, 27 Wis., 151, it is said:

"If previous legislative consent merely be wanting, that may be sup-"plied by legislative enactment, and then if the corporation treats as "valid its former proceedings, they are valid."

The value of the Wisconsin decision, just cited, in the case at bar, rests upon the fact that the decisions of that state deny the right of a legislature, independently of constitutional enactment, to create a debt against a city without consent of its authorities, and the law in Wisconsin and Illinois, being alike, the decisions, in either state, become applicable in the other.

Finally, upon the question of a debt created without the consent of the corporate authorities of Quincy, the validating act of March 27, 1869, was passed in the days of special legislation and before the constitution of 1870 had made such legislation unconstitutional. It is hardly to be supposed that the legislature of Illinois would have known anything about Quincy's subscription to the capital stock of said railroad company, if the authorities of Quincy had not brought such fact to the knowledge of that body. It is unreasonable to suppose that the legislature would have set out to validate said subscription except at the request of Quincy's authorities. The reasonable assumption is that it was done at the request of Quincy's authorities and, hence, there was, by the passage of said act, no creating a debt without consent of the corporate authorities of Quincy.

VI.

We now come to the question of the one coupon cut off from the bond dated July 1st, 1870, but issued after the constitution of 1870 had gone into effect.

The separate clause of the constitution of 1870, cited by counsel for plaintiff in error, prohibits a city from ever becoming subscriber to the capital stock of a railroad corporation, or making donation thereto, or loaning its credit in aid thereof, with a saving clause giving the right to make any subscription authorized under existing laws, by the vote of the people of the municipality, prior to the adoption of the new constitution. The said clause is future in its term. It contemplates future subscriptions, and has, therefore, no applicability to the case at bar.

In the case at bar, the subscription had already been made when the new constitution of 1870 took effect, and the contract with the railroad company was a completed one long prior to the going into effect of said new constitution, or any separate article thereof. That contract being complete when the new constitution of 1870 took effect, the city could carry out its terms afterwards.

The new constitution of 1870 having no effect upon contracts made before it went into force, and the subscription being valid, the bonds are also valid, even as to the portion issued after July 1st, 1870.

County of Moultrie vs. Savings Bank, 92 U. S., 633.

Board of Education vs. Bolton, 104 Ill., 222.

Decker vs. Hughes, 68 Ill., 40.

But the record shows that the defendant in error's intestate was a *bona fide* purchaser for value without notice of defence, etc. (R. 97). How was he to know that a bond dated July 1st, 1870, was not, in fact, issued after the new constitution of 1870 went into effect? Was not such purchaser entitled to presume that the bond was issued when it bore date? Moreover, as the City Council of Quincy was, by the terms of the subscription made, to judge of the performance of conditions, the fact that the bond had been issued, was evidence to such purchaser that the conditions had been performed to the satisfaction of the city, and if anything else were needed to strengthen his title, the fact that the bonds from which the coupons in suit were detached, recited that they were issued by virtue of an order of the City Council of Quincy, passed August 7th, 1868, and said validating act would estop the city to say that the bonds had been issued without performance of the conditions.

But plaintiff in error seem to argue that the burden of proof to show performance of conditions as to the few bonds issued after July 1st, 1870, was upon defendent in error.

Suppose for a moment his position were correct—yet certainly a *prima facie* case would be made upon this point, by the introduction of the coupon in evidence—proof of issue of the bonds by the city council of Quincy, proof of the recitals in the bonds which are averred in the declaration filed in the case, and proof of voting on the stock received in exchange for said bonds—all of which appear in the findings of the court.

VII.

But the bonds from which the coupons in suit were detached can be sustained uner the act of February 16th, 1857, a part of Quincy's charter at the time the bonds in suit were issed (Record p. p. 86, 87. Printed Record, p. 33.)

By this last named act, the city council of Quincy was in substance empowered to issue bonds at any time for any municipal purposes, not in excess of $75.000 at any one time—if we understand said last act and the interpretation put apon it by the Supreme Court of Illinois, in

City of Quincy, vs. Warfield, 25 Ill., 317.

In this last named case, the Supreme Court of Illinois define Quincy's power under the act last named to be, an express general power to issue bonds within a fixed limit as to amount and without any regard to the purpose. The general principles of law would of course limit the purposes of their issue to a corporate purpose. Having the general power to issue bonds though limited to $75,000 at any one time and not having issued over $75,000 at any one time, the city should be held liable on the bonds in controversy under said act of 1857, upon the decisions of this Court, in

Rogers vs Burlington, 3 Wall, 154.

Meyer vs. Muscatine, 1 Wall, 384.

Gelpcke vs. Dubuque, 1 Wall, 176.

On the authority of these last cited cases, the purchaser of bonds may resort to any law in existence when they were isseud to sustain his bonds and even if the recitals on the bonds do not refer to the right law, the valadity of the bonds containing them is not affected by any mistake or omossion in this regard.

Commissioners vs. January, 94 U. S., 205.

The fact of long acquiescence by the municipality and the citizens thereof, of the city's receiving and voting upon stock received for the bonds it now seeks to repudiate—of long payment of interest—all these facts place the holders of the bonds sued on in a position where they may appeal with confidence to this court in asking an affiirmance of the judgment rendered below.

~~WILLIAM MARSH~~,
WILLIAM McFADON,
Attorneys for Defendant in Error.

176 U.S. 576

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 252.

MARY E. MYERS, WIDOW OF GEORGE MYERS, DECEASED, IN HER OWN RIGHT AND AS NEXT FRIEND OF ARTHUR H. MYERS, ETHEL P. MYERS, AND ELMER K. MYERS, INFANT CHILDREN AND HEIRS AT LAW OF GEORGE MYERS, DECEASED; CAROLINE KELLOCK AND HER HUSBAND, CORNELIUS M. KELLOCK, ROBERT C. MYERS, GEORGE B. MYERS, KATE M. MYERS, AND JAMES C. MYERS, HEIRS AT LAW OF GEORGE MYERS, DECEASED, PLAINTIFFS IN ERROR,

vs.

FREDERICK J. SWANN, ALEXANDER D. WADDELL AND HIS WIFE, LUCY, FREDERICK W. SWANN, F. J. SWANN, JR., BY HIS NEXT FRIEND, FREDERICK W. SWANN; ANN SWANN, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

FILED AUGUST 17, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 252.

MARY E. MYERS, WIDOW OF GEORGE MYERS, DECEASED, IN HER OWN RIGHT AND AS NEXT FRIEND OF ARTHUR H. MYERS, ETHEL P. MYERS, AND ELMER K. MYERS, INFANT CHILDREN AND HEIRS AT LAW OF GEORGE MYERS, DECEASED; CAROLINE KELLOCK AND HER HUSBAND, CORNELIUS M. KELLOCK, ROBERT C. MYERS, GEORGE B. MYERS, KATE M. MYERS, AND JAMES C. MYERS, HEIRS AT LAW OF GEORGE MYERS, DECEASED, PLAINTIFFS IN ERROR,

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FREDERICK J. SWANN, ALEXANDER D. WADDELL AND HIS WIFE, LUCY, FREDERICK W. SWANN, F. J. SWANN, JR., BY HIS NEXT FRIEND, FREDERICK W. SWANN; ANN SWANN, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of North Carolina, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Frederick J. Swann, Alexander D. Waddell, and wife Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend the said Frederick W. Swann; Ann Swann and Mary Hill, William S. London, Henry A. London, jr., Frank London, Ann M. Zimmerman, John R. London, Fred. H. London, Snowdon London & Eliza London, his wife, William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett, jr., M. J. De Rossett, Catharine G. Meares, Graham Davis & wife Alice, Charles D. Myers and Eliza his wife, and Gabriella DeGordon De Rossett, Robert Cowan De Rossett, Kate De Rossett and Frederick J. Lord, as plaintiffs, and George Myers as defendant, a manifest error hath happened, to the great damage of the said George Myers, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the thirtieth day of March, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] W. J. RIDDICK,
Clerk of the Circuit Court of the United States
Eastern Dist. of N. Carolina.

Allowed by—

2 Circuit court, 4th circuit.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

Be it remembered, that on the 18th day November, A. D. 1878, W. M. Baldwin, clerk of the superior court of Columbus County, State of North Carolina, filed in the office of the clerk of the circuit court of the United States for the district aforesaid, a transcript of the record of said superior court, in the words and figures following, to wit:

3 STATE OF NORTH CAROLINA:

Be it remembered that a superior court for the county of Columbus is this day assembled and held at the court-house in Whiteville, it being the sixth Monday after the second Monday of August, A. D. 1878,

and the 23d day of September, in said year. Present and presiding the hon. R. P. Buxton, judge.

IN THE MATTER OF FREDERICK J. SWANN, Alexander D. Waddell, and his wife, Lucy, Frederick W. Swann, F. J. Swann, by his next friend, Frederick W. Swann; Ann Swann, and Mary Hill, plaintiffs,
against
GEORGE MYERS, WILLIAM S. LONDON, HENRY A. London, jr., Frank London, Fanny London, Ann M. Zimmerman, John R. London, Fred. H. London, Snowden and Eliza Snowden, his wife, William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett, jr., M. J. De-Rossett, Catharine G. Meares, Graham Davis and wife Alice, Charles D. Myers, and Eliza, his wife, Gabriella de Gordin De Rossett, Robert Cowan De Rossett, and Kate De Rosset', infants under the age of 21 years, and Frederick J. Lord, defendants.

Bond for costs.

We, F. J. Swann, Ann Swann, F. W. Swann and wife Rebecca A., Alfred D. Waddell and wife Lucy, A. J. Hill and wife Mary, the plaintiffs, and George R. Griffith and R. R. Shem, our executors, are
4 bound to the defendant, George Myers, in the above-entitled action in the sum of two hundred dollars. This obligation to be void upon the condition that the said plaintiffs shall pay to the defendant all such costs as the defendant may recover of the plaintiffs in said action; otherwise to remain in full force and effect.

Witness our hands and seals this 27th day of March, 1873.

M. Q. WADDELL, *Att'y.* [SEAL.]
ANN SWANN. [SEAL.]
A. D. WADDELL & WIFE LUCY.
F. J. SWANN. [SEAL.]
F. W. SWANN & WIFE REBECCA.
A. J. HILL & WIFE MARY.
In the presence of— R. R. GRIFFITH. [SEAL.]
R. R. THREE. [SEAL.]

STATE OF NORTH CAROLINA,
Chatham County:

On this 27th day of March, 1873, before me, personally appeared R. R. Griffith and R. R. Three, to me to be known the persons executed the foregoing bond, and personally acknowledged that they did execute the same; and the said R. R. Griffith and R. R. Three, being duly sworn, severally say, each for himself, that he is a resident and freeholder in said county, and worth double the amount of the foregoing bond, exclusive of property exemptions from executions, and over and above all liabilities.

S. T. PETTY,
Clerk Superior Court, Cha'ham County.

5 *Summons.*

Superior court, New Hanover County.

FREDERICK J. SWANN, ASA SWANN, WIFE, ET al., plaintiffs,
against
GEORGE MYERS, DEFENDANT.
} Summons.

State of North Carolina to the sheriff of New Hanover County, greeting:

You are hereby commanded to summons George Myers to appear at the next term of said court, to be held at the court-house in Wilmington, on the eighth Monday after the fourth Monday in February, 1873, to answer the complaint of said plaintiffs.

If the defendant shall fail to appear at that time, the plaintiff will apply for the relief demanded in the complaint, together with the costs of this action.

Of this summons make due return to the clerk of said court for the county of New Hanover.

Given under my hand and seal of said court this 9th day of April, 1873.

J. C. MANN,
Clerk of said Court.
CANADAY, *D'p'y.*

(Endorsed:)

To hand April 9th, 1873. George Myers is not to be found in my county. The copy of this summons for George Myers was left at his store in the hands of R. C. Myers.

A. R. BLACK, *Sheriff.*

6 *Summons.*

Superior court, New Hanover County.

FREDERICK J. SWANN, ASA SWANN, WIFE, AND others, plaintiffs,
against
GEORGE MYERS, DEFENDANT.
}

The State of North Carolina to the sheriff of New Hanover County, greeting:

You are hereby commanded to summons George Myers to appear at the next term of said court, to be held at the court-house, in Wilmington, on the fourth Monday in June, 1873, to answer the complaint of the said plaintiffs.

If the defendants shall fail to appear at that time, the plaintiffs will apply for the relief demanded in the complaint, together the costs of this action.

Of this summons make due return to the clerk of said court of the county of New Hanover.

Given under my hand and seal of said court this 23d day of May, 1873.

J. C. MANN,
Clerk of said Court.

(Endorsed as follows, viz:)

To hand. Service of copies of summons and complaint accepted as of June term, A. D. 1873.

EMPIE & POISSON,
Att'ys for Defendant.

7 *First Complaint.*

In the superior court, spring term, 1873.

STATE OF NORTH CAROLINA,
New Hanover County:

FREDERICK J. SWANN, ALEXANDER D. WADDELL, and his wife Lucy; Frederick W. Swann, and his wife Rebecca; Ann Swann, and Arthur J. Hill, and his wife Mary, plaintiffs,
against
GEORGE MYERS, DEFENDANT.

The plaintiffs above named complain and allege:

1. That Alice Heron, of Wilmington, North Carolina, on the 2d day of May, A. D. 1811, made her last will and testament, duly executed, to pass real estate, and appointed as executors thereof John Waddell and John R. London, and afterwards died in the year 1813, and thereupon her said will was duly proved in the court of pleas and quarter sessions for New Hanover County, by John R. London, who alone qualified as executor to said will and took upon himself the burden of its execution.

2. That in and by her said will the testatrix in one clause thereof devised as follows: "I give and devise to my executors, hereinafter appointed, all of that tract of land lying between the southern boundary of Wilmington and Greenfield's plantation; also my land lying on or near Long Creek, in the county of New Hanover, to be sold by my executors, or the survivor, or the executor of such survivor, and the money arising from the sale of said tract or tracts; 1st, after deducting my legacies to Mary and William McKenzie, to be loaned upon interest until it shall amount to fifteen hundred dollars, and then such sum to be ex-
8 pended by my executors, or the executor of such survivor, in the improvement of my lots hereinafter devised, in trust, to the use and benefit of my granddaughter, Frances Swann. I give and devise all the residue of my real estate, of whatever name and kind, to John Waddell and John R. London, and the survivor, and the executor of such survivor, to the use of said John Waddell and John R. London, and the survivor and the executor of such survivor, in trust and confidence for the several interests and purposes, provisions, and limitations hereinafter exexpressed and declared, that is to say, to the separate use and behoof of said Frances Swann, for and during her life, and after her death in trust as aforesaid to the use of such child or children as may be alive at her death, or in case my granddaughter Frances demise without children or child, but leaving the issue of child or children, then to the issues of child or children last-mentioned, provided, however, that at the death of my granddaughter Frances, neither her issue, or the child or children of such issue shall be at the age of twenty-

one years; or after death of my granddaughter none of her issue, or the children of her issue shall arrive to the year of twenty-one years, then, and then only, to the use of those who would have inherited my estate had Frances died without issue, or children of such issue in my lifetime."

8. That said testatrix in a subsequent clause of her said will devised as follows: "And it is my will that the trustees aforesaid, and the
9 survivor, and the executors of the survivor, in the soundness of their discretion, may join with the cestui que use or guardian of cestui que, use in making any conveyances of the above property settled in trust as aforesaid as to them may seem proper."

That these are the only clauses in the said will devising and limiting the real estate, as will appear by reference to said will, a copy of which will be filed when required.

4. That said John R. London survived the said John Waddell, and afterwards departed this life, having first duly made his last will and testament, in which he appointed William C. Lord and Marsden Campbell his executors, who duly proved the said will in the court of pleas and quarter sessions of the county of New Hanover, and qualified thereto, taking upon themselves the burden of the execution thereof.

5. That on the 12th day of February, A. D. 1836, the said William C. Lord and Marsden Campbell, executors of the said John R. London, and John Swann and the said Frances Swann, his wife, executed a deed intending to convey, and purporting to convey to one Erastus Buck and his heirs a certain parcel of land lying in the city of Wilmington, and known in the plan of said town as lot No. 12, begin'ing at the southwest corner of an alley on Front street, running thence south along Front street seventy-three (73) feet to the northwest corner of lot B, No. 17; thence east, towards Second street, along the northern line of said lot No. 17, three hundred and thirty feet (330), to Second street; thence north,
10 along the line of Second street, sixty-six (66) feet, to the southeast corner of said alley; thence west, along the southern line of said alley, to the beginning, for and in consideration of the sum of two thousand dollars to them in hand paid by the said Buck; that said deed recited the provisions of the said will, as in this complaint above stated and expressed, that the said William C. Lord and Marsden Campbell, as executors of John R. London, the surviving executor and trustee, believed it to be advantageous to the interest of the *of the* cestui que use, Frances Swann, to make and execute said conveyance for the price aforesaid; that the said deed was executed under the hand and seal of William C. Lord as one of the executors aforesaid, and purported to be executed under the hand and seal of Marsden Campbell, the other of said executors, by William C. Lord, attorney, though it does not appear, except in that way, that he had any power of attorney. The said deed was also executed under the respective hands and seals of the said John Swann and his wife Frances, and it was proved and registered in the books of the register of deeds of the county of New Hanover, without any privy examination of the said Frances, wife of the said John, having been taken by Thomas Settle, then one of the judges of the superior court of law and equity of the State of North Carolina, before whom the acknowledgment was made, and who made the order of registration.

11 6. That the said Frances Swann continued to live until the year

1871, when she died, leaving at the time of her death the plaintiffs Frederick J. Swann, Lucy, who is the wife of Alexander D. Waddell, Rebecca, who is the wife of Frederick W. Swann, Ann Swann, and Mary, who is the wife of Arthur J. Hill, and these are the only children of Frances Swann, the grand-daughter of the testatrix, Alice Heron, who were living at the death of their mother, and who claim the real estate which are by the provisions of the said will given to their mother for life, and then to them after her death as is above set forth in this complaint.

7. That the plaintiffs are the owners in fee-simple as tenants in common of the store-house and lot now in the possession of the defendant; that said store-house and lot are part of the parcel of land mentioned and described in the deed of conveyance above-mentioned from the said William C. Lord and Marsden Campbell, executors and trustees as aforesaid, and the said John Swann and his wife Frances, to the said Erastus Buck, and the said defendant claims the same under a title derived from said Buck.

8. That the defendant withholds the possession from the plaintiffs, whereupon the plaintiffs demand:

1. Judgment for the possession of the said premises.
2. For five thousand dollars damages for withholding the same.

M. Q. WADDELL &
WILLIAM H. BATTLE & SONS,
Attorneys for Plaintiffs.

12 STATE OF NORTH CAROLINA,
New Hanover County:

Arthur J. Hill, one of the plaintiffs above named, being duly sworn by me, H. E. Scott, a justice of the peace in and for said county of New Hanover, and State aforesaid, says that the foregoing complaint is true to his own knowledge except to those matters therein stated on information and belief of the plaintiffs, and as to those matters he believes them to be true.

A. J. HILL.

Sworn to and subscribed before me this 17th of April, A. D. 1873.
H. E. SCOTT, *J. P.*

NORTH CAROLINA,
Moore County:

F. W. SWANN, A. D. WADDELL, AND OTHERS,
vs.
GEORGE MYERS.

This day, before A. H. McNeill, clerk of the superior court for the county of Moore, State of North Carolina, came F. W. Swann and A. D. Waddell, two of the plaintiffs in the above styled suit, and made oath that they cannot have a fair trial of said suit now pending in the superior court of the county of New Hanover, State aforesaid, because the suit involves the title to a large amount of real estate situate in the city of Wilmington, county of New Hanover, and the defendant and many other
13 persons interested in that question are men of wealth and influence, and that influence has been, and the plaintiffs declare will continue to be, used to the prejudice of the rights of the plaintiffs, so that they can-

not have a fair trial in the said county of New Hanover. The plaintiffs therefore pray that the said suit may be removed to some adjoining county for trial.

F. W. SWANN.
A. D. WADDELL.

Sworn to and subscribed before me this April 23d day, 1875.
JOHN WALKER, *J. P.*

NORTH CAROLINA,
Moore County:

I, J. H. McNeill, clerk of the superior court for said county, do hereby certify that John A. Walker, whose genuine signature appears to the foregoing affidavits of Swan and Waddell, is an acting justice of the peace, duly commissioned and qualified, and all his official acts as such are entitled to full faith and credit.

Given under my hand and seal of office this 24th day of April, A. D. 1875.

A. H. McNEILL, *C. S. C.*

14 Superior court, June term, 1875.

STATE OF NORTH CAROLINA,
New Hanover County:

FREDERICK J. SWANN, ALEXANDER D. WADDELL and his wife Lucy, Frederick W. Swann and his wife Rebecca, Ann Swan, and Arthur J. Hill and his wife Mary, plaintiffs,
against
GEORGE MYERS, DEFENDANT.

On motion of the attorneys of the plaintiffs, made on the affidavit of F. W. Swann and A. D. Waddell, filed in this cause, it is ordered by the court that this cause be removed for trial to the county of Columbus, and set for trial on Friday of the first week of the spring term, 1876, of the superior court of said county. The place and time herein fixed for the trial of said cause is consented to by all the parties to this action.

ALLMAND A. McKOY,
Judge Presiding.

Superior court.

STATE OF NORTH CAROLINA,
New Hanover County:

15 I, James Heaton, clerk of the superior court of New Hanover County aforesaid, do hereby certify that the foregoing is a true and perfect transcript of all the papers in the case Frederick J. Swann & others against George Myers, number 1402, New Hanover County, trial docket. In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in Wilmington, this 10th day of March, A. D. 1876.

JAMES HEATON,
Clerk of Superior Court, New Hanover County.
J. BISHOP, *Deputy Clerk.*

NORTH CAROLINA:

Be it remembered that a superior court of law is this day opened and held for the county of Columbus at the court-house in Whiteville, it being the fourth Monday after the second Monday of February, A. D. 1876, and the 13th day of March in said year. Present and presiding, the Hon'l Allmond A. McKoy, judge of the 4th judicial district of North Carolina.

F. J. SWANN AND OTHERS
vs.
GEORGE MYERS.

The following jurors are sworn and empanneled to try the issue, viz: Robert Powers, M. D. Bullard, William Nance, J. H. Stanley, Anderson Thompson, E. H. Thompson, A. M. Worley, Wm. McD. Maultsby, E. D. Williams, J. M. Shipman, J. M. Holton, and J. M. Harrelson, who say they find all the issues in favor of the defendant, and that he
16 have judgment for his costs. Rule for new trial. Rule discharged.

From which judgment the plaintiffs pray an appeal to the supreme court, which is granted upon entering into bond in the sum of thirty-five dollars.

Notice waived and bond filed.

NORTH CAROLINA:

Be it remembered that a superior court of law is this day opened and held for the county of Columbus at the court-house in Whiteville, it being the second Monday after the fourth Monday of August, A. D. 1876, and the 11th day of September in said year. Present and presiding the Hon. Allmond A. McKoy, judge of the fourth judicial district of North Carolina.

SWANN AND OTHERS
vs.
GEORGE MYERS.

For want of transcript from supreme court this cause is continued without prejudice to either party.

NORTH CAROLINA:

Be it remembered that a superior court of law is this day opened and held for the county of Columbus at the court-house in Whiteville, it being the second Monday after the fourth Monday of February, A. D. 1877, and 13th day of March in said year. Present and presiding the Hon. Aug. S. Seymour, judge 4th district of North Carolina.

17 Spring term, 1877, superior court, Columbus County.

F. J. SWANN & OTHERS
vs.
GEORGE MYERS.

It is ordered that the plaintiffs have leave to amend the complaint gen-

erally within ninety days after this term, and that defendants have leave to withdraw the former answer and file a new one at the next term.

AUG. S. SEYMOUR,
Judge Presiding.

Amended complaint.

STATE OF NORTH CAROLINA,
Columbus County:

Superior court.

FREDERICK J. SWANN, ALEXANDER D. WADDELL and his wife Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend, the said Frederick W. Swann, Ann Swann, and Mary Hill, plaintiffs,

against

GEORGE MYERS, WILLIAM S. LONDON, HENRY A. London, jr., Frank London, Fanny London, Ann M. Zimmerman, John R. London, Fred. H. London, Snowden and Eliza Snowden his wife, William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett, jr., M. J. De Rossett, Catharine G. Meares, Graham Daves and Alice his wife, Charles D. Myers and Eliza his wife, and Gabriella de Gozdin De Rossett, Robert Cowan De Rossett and Kate De Rossett, infants under the age of 21 years, and Frederick J. Lord, defendants.

18

The plaintiffs above named by their amended complaint complain and allege:

1st. That Alice Heron, of Wilmington, North Carolina, on the 2nd day of May, A. D. 1811, made her last will and testament, duly executed, to pass real estate, and appointed as executors thereof John Waddell and John R. London, and afterwards died in the year 1813; and thereupon her said will was duly proved in the court of pleas and quarter sessions of New Hanover County by John R. London, who alone qualified as executor to said will, and took upon himself the burden of its execution.

2d. That in and by her said will the testatrix in one clause thereof devised as follows: "I give and devise to my executors hereinafter appointed all that tract of land lying between the southern boundary of Wilmington and the Greenfield plantation, also all my land lying near or on Long Creek, in the county of New Hanover, to be sold by my executors or the survivor or the executors of such survivor, and the money arising from the sale of said tract or tracts, first deducting my legacies to William & Mary McKenzie, to be loaned upon interest until it shall amount to fifteen hundred dollars, and then such sum to be expended by my executors or the survivor or the executor of such survivor in the improvement of my lots hereinafter devised in trust to the use and benefit of my granddaughter, Frances Swann. I give and devise all the residue of my real estate of

whatever nature and kind to John Waddell and John R. London, and the survivor and the executor of such survivor to the use of the said John Waddell and John R. London, and to the executor of such sur-
19 vivor in trust and confidence for the several interests and purposes, provisions and limitations hereinafter expressed and declared; that is to say, to the separate use and behoof of the said Frances Swann for and during her life, and after her death, in trust as aforesaid, to the use of such child or children as may be alive at her death; or, in case my granddaughter Frances's demise without children or child, but leaving the issue of such child or children, then to the use of such child or children last mentioned; provided, however, that if at the death of my granddaughter, Frances, neither her issue or the child or children shall be at the age of twenty-one years, or after the death of granddaughter none of her issue or the children of her issue shall arrive to the years of twenty-one, then and then only to the use of those who would have inherited my estate had Frances died without issue or children of such issue in my life-time."

3d. That the testatrix, in a subsequent clause of her said will, devised as follows: "And it is my will that the trustees aforesaid and the survivor and the executor of the survivor, in the soundness of their discretion, may join with the cestui que use or guardian of cestui que use in making any conveyance of the above property settled in trust as aforesaid, as may to them seem proper." That these are the only clauses in the said will devising and limiting the real as will *as will* appear by reference to said will, a copy of which will be filed when required.

4th. That the said John R. London survived the said John Wad-
20 dell, and afterwards departed this life, having first duly made his last will and testament, in which he appointed William C. Lord and Marsden Campbell his executors, who duly proved said will in the court of pleas and quarter sessions in the county of New Hanover, and qualified thereto, taking upon themselves the burden of the execution thereof.

5th. That on the 12th day of February, A. D. 1836, the said William C. Lord and Marsden Campbell, as executors of the said John R. London, and John Swann and the said Frances Swann, his wife, executed a deed intending to convey and purporting to convey to one Erastus Buck and his heirs a certain parcel of land lying in the city of Wilmington and known in the plan of said town as lot No. 12, beginning at the southwest corner of an alley on Front street and running thence south along Front street seventy-three (73) feet to the northwest corner of lot B, No. 17; thence east towards Second street along the northern line of said lot No. 17 three hundred & thirty (330) feet to Second street sixty-six (66) feet to the southeast corner of said alley; thence west along the southern line of said alley to the beginning, for and in consideration of the sum of two thousand dollars to them in hand paid by the said Buck. That said deed recited the provisions of said will as in this complaint above stated and expressed, that the said William C. Lord and Marsden Campbell, as executors of John R. London, the surviving executor and trustee, believed it to be advantageous to the interest of the cestui que use, Frances
21 Swann, to make and execute said conveyance for the price aforesaid. That the said deed was executed under the hands and seals of William C. Lord, as one of the executors aforesaid, and purported to be executed under the hand and seal of Marsden Campbell, the other of said

executors, by William C. Lord, attorney, though it does not appear except in that way that he had any power of attorney. And the plaintiffs allege that the said William C. Lord did not have any power of attorney or any other authority whatever from the said Marsden Campbell to sell said premises or to execute said deed for and in his, the said Campbell's, name. The said deed was also executed under the respective hands and seals of the said John Swann and his wife Frances, and it was proved and registered in the books of the register of the county of New Hanover, the privy examination of the Frances, wife of the said John Swann, having been taken by Thomas Settle, then one of the judges of the superior courts of law and courts of equity of the State of North Carolina, before whom the acknowledgment of the parties was made and who made the order of registration.

6th. That the said Marsden Campbell removed from this State to the State of Louisiana in the year 1834, and afterwards died intestate in said State of Louisiana in the year 1844.

7th. That William C. Lord survived the said Marsden Campbell and died intestate in the year 1847, and his heirs at law are the defendants,
Frederick J. Lord, his son, and Ann M. Zimmerman, widow of B.
22 Zimmerman, Fanny London, William S. London, Henry A. London, jr., and Frank London, John R. London, Fred. H. London, and Eliza Snowden, wife of Snowden, who are the children of Sally London, a deceased daughter of said William C. Lord, and the defendants William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett, jr., M. J. De Rossett, Alice Davis, wife of Graham Davis, Eliza Myers, wife of Charles D. Myers, and Catharine G. Meares, wife of Gaston Meares, deceased, who are the children of Eliza De Rossett, a deceased daughter of said William C. Lord and Gabriella de Gordin De Rossett, Robert Cowan De Rossett, and Kate De Rossett, who are the grandchildren of the said Eliza De Rossett, and are the children of Louis H. De Rossett, dec.

8th. That the said Gabriella de Gordin De Rossett, Robert Cowan De Rossett, and Kate De Rossett are infants under the age of twenty-one years, and have no general or testamentary guardian, as the plaintiffs have been informed and believe.

9th. That the heirs at law of Alice Heron are the plaintiffs Frederick J. Swann, Ann Mary Hill, Lucy Waddell, and F. J. Swann, jr., who are the issue of the said Frances Swann and the issue of Mary McKenzie, deceased, if she have any issue now in being.

10th. That William McKenzie and Mary McKenzie, the only children and heirs at law of the above-named Mary McKenzie, removed from this
State to the State of South Carolina more than forty years ago,
23 and the plaintiffs after the most diligent enquiry have not been able to ascertain whether they are living or dead, or whether they or either of them have heirs or issue living or not, nothing having been heard from said William and Mary McKenzie forty (?) thirty years or more.

11th. That Frederick J. Swann, Rebecca M. Swann, the wife of Frederick W. Swann, Lucy Waddell, the wife of A. D. Waddell, Ann Swann, and Mary Hill, the wife of Arthur J. Hill, are the children of the said Frances Swann, who were living at the time of her death, and the said Frances Swann and Mary McKenzie were the only issue and heirs at law of the said Alice Heron at her death.

12th. That since the commencement of this action the said Arthur J. Hill has died, leaving him surviving his widow, the said Mary Hill; and the said Rebecca M. Swann, the wife of Frederick W. Swann, has also died intestate, leaving the said F. J. Swann, jr., who is an infant under twenty-one years of age and without guardian, her only issue and heir at law, and he sues herein by his father and next friend, Frederick W. Swann.

13th. That the said Frances Swann survived her husband, John Swann, and continued to live until the year, 1871, when she died, and that the children of said Frances Swann living at the time of her death are the said Frederick J. Swann, who was born the 15th day of October, in the year 1823; Lucy Waddell, the wife of Alexander D. Waddell, who was born the 25th day of January, in the year 1831; Rebecca M., the
24 wife Frederick W. Swann, was born the 20th of September, in the year 1829; Ann Swann, who was born the 10th day of September, 1818; Mary Hill, the wife of Arthur J. Hill, was born the 7th day of January in the year 1811, and that these are the only children of the said Frances Swann, the granddaughter of the testatrix, Alice Heron, who were living at the time of the death of their mother. That since the commencement of this action the said Arthur J. Hill has died, leaving him surviving his widow, the said Mary Hill, and the said Rebecca M. Swann has also died intestate, leaving her surviving her husband, the said Frederick W. Swann, and F. J. Swann, jr., their child, he being their only issue and heir at law; and the said Frederick J. Swann, Lucy Waddell, the wife of Alexander D. Waddell, Frederick W. Swann, the husband, and F. J. Swann, jr., the son of Rebecca M. Swann, Ann Swann, and Mary Hill, claim the real estate which is by the provisions of the said will devised to the said Frances Swann for her life and then to her said children after her death, as is above set forth in this complaint.

14th. That the plaintiffs are the owners in fee-simple as tenants in common of the storehouse and lot now in the possession of the defendant, George Myers; that said storehouse and lot are a part of the parcel of land mentioned and described in the deed of conveyance above mentioned purporting to be from the said William C. Lord and Marsden Campbell, executors and trustees as aforesaid, and the said John Swann and
25 his wife Frances to the said Erastus Buck, and the said defendant George Myers claims the same under a title derived from the said Erastus Buck.

15th. That the plaintiffs are advised and allege that the heirs at law of the said William C. Lord, above-mentioned, are necessary parties to a complete determination of the questions involved in this action; that at spring term, A. D. 1877, of this court the plaintiffs obtained the leave of the court to make them parties thereto, and since that time have requested them to become parties plaintiff, with which request they have refused to comply, and for that reason the plaintiffs have caused them to be made defendants.

16th. That the defendant, George Myers, wrongfully withholds the possession of said premises from the plaintiffs, wherefore the plaintiffs demand judgment—

1st. For the possession of said premises.

2d. For the recovery from the defendant, George Myers, of eight thousand dollars damages for withholding the same.

3d. For a conveyance to the plaintiffs from the said heirs at law of William C. Lord, of any estate or interest which they may have in the premises.

4th. For the costs of this action.

5th. For such other and further relief as the nature and circumstances of the case shall require and to this honorable court shall seem meet and proper.

WM. H. BATTLE & SON,
M. Q. WADDELL,
W. S. & J. D. DEVANE,
Attorneys for Plaintiffs.

26 *Affidavit.*

STATE OF NORTH CAROLINA,
Moore County:

Office of clerk of the superior court.

A. D. Waddell and F. J. Swann, two of the above-named plaintiffs, being by me first duly sworn, depose and make oath that they have read the foregoing amended complaint and know the contents thereof; and that the same is true of their own knowledge, except as to those matters therein stated on information and belief, and as to those matters they believe it to be true.

A. D. WADDELL.
F. J. SWANN.

Subscribed and sworn to before me this 22d day of May, 1877.
A. H. McNEILL, *C. S. C.*

Summons.

Superior court, Columbus County.

F. J. SWANN, ALEXANDER D. WADDELL & his wife, Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend the said Frederick W. Swann, Ann Swann, and Mary Hill, plaintiffs,
against,
GEORGE MYERS, WILLIAM S. LONDON, HENRY A. Lond', jr., Frank London, Fanny London & others.

State of North Carolina to the sheriff of Chatham County, greeting:

You are hereby commanded to summon William S. London, Henry A. London, jr., Frank London, Fanny London, and Ann M. Zimmerman, defendants in the above action, to appear at the next term of said court to be held at the court-house, in Whiteville, on the fourth Monday
27 after the second Monday of August, 1877, to answer the complaint of the said plaintiffs. If the defendants shall fail to appear at that

time the plaintiffs will apply for the relief demanded in the complaint, together with the costs of this action. Of this summons make due return to the clerk of said court for the county of Columbus. Given under my hand and seal of said court this 4th day of June, 1877.

[SEAL.] W. M. BALDWIN,
Clerk of said Court.

(Endorsed:) To hand June 10th, 1877. Served by delivering a copy of this summons to Fanny London, W. S. & Frank London, also Mrs. Zimmerman and H. A. London, jr.

J. W. TAYLOR,
Sheriff of Chatham.

Summons.

Superior court, Columbus County.

FREDERICK J. SWANN, ALEXANDER D. WADDELL and his wife, Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend the said Frederick W. Swann; Ann Swann, and Mary Hill, plaintiffs,

against

GEORGE MYERS, WILLIAM S. LONDON, HENRY A. London, jr., Frank London, Fanny London, and others.

State of North Carolina to the sheriff of New Hanover County, greeting:

You are hereby commanded to summons Charles D. Myers and Eliza Myers, his wife, Frederick J. Lord, William L. De Rossett, M. J. De Rossett, Armand J. De Rossett, jr., Thomas C. De Rossett, Graham Davis and Alice Davis, his wife, and Catharine G. Mears, defendants in the above action, to appear at the next term of said court to be held at the court-house in Whiteville, on the fourth Monday after the second Monday of August, 1877, to answer the complaint of the said plaintiffs. If the defendants shall fail to appear at that time the plaintiffs will apply for the relief demanded in the complaint, together with the costs of this action. Of this summons make due return to the clerk of said court for the county of Columbus. Given under my hand seal of said court this 4th day of June, 1877.

28

[SEAL.] W. M. BALDWIN,
Clerk of said Court.

Endorsed as follows: To hand June 5th, 1877. Executed on all except Catharine D. Meares, who is not to be found in New Hanover County. July 20, 1877.

S. H. MANNING, *Sheriff.*

Summons.

Superior court, Columbus County.

FREDERICK J. SWANN, ALEXANDER D. WADDELL and his wife, Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend the said Frederick W. Swann; Ann Swann, & Mary Hill, plaintiffs.

against

GEORGE MYERS, WILLIAM S. LONDON, HENRY A. London, jr., Frank London, Fanny London, & others, defendants.

State of North Carolina to the sheriff of Henderson County, greeting:

29 You are hereby commanded to summon Catharine G. Meares, one of the defendants in the above action, to appear at the next term of said court to be held at the court-house in Whiteville, on the fourth Monday after the second Monday in August, 1877, to answer the complaint of said plaintiffs. If the defendants shall [fail] to appear at that time the plaintiffs will apply for the relief demanded in the complaint, together with the costs of this action. Of this summons make due return to the clerk of said court for the county of Columbus.

Given under my hand and seal of said court this 4th day of June, 1877.

W. M. BALDWIN,
Clerk of said Court.

(Endorsed as follows:) Due search made. Not to be found in my county.

J. WILLIAMS, *Sheriff.*
HENDERSON.

Answer.

STATE OF NORTH CAROLINA:

Superior court of law, Columbus County.

FREDERICK J. SWANN, ALEXANDER D. WADDELL and his wife, Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend Frederick W. Swann; Ann Swann, & Mary Hill, plaintiffs,

against

GEORGE MYERS, WILLIAM S. LONDON, HENRY A. London, jr., Frank London, Fanny London, Ann M. Zimmerman, John R. London, Fred. A. London, William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett, jr., M. J. De Rossett, Catharine G. Meares, Graham Davis and

30 Alice, his wife, Charles D. Myers and Eliza, his wife, and Gabriella de Gordin De Rossett, Robert Cowan De Rossett, and Kate De Rossett, infants under the age of 21 years, Snowden and Eliza Snowden, his wife, and Frederick J. Lord, defendants.

The defendant George Myers ans'ers to the amended complaint of the plaintiffs—

First. For a first defence, that all the allegations of fact contained in the first, second, third, and fourth articles of the complaint are admitted to be true.

2. That all the allegations of fact contained in the fifth article of the complaint are admitted to be true, except the allegation that William C. Lord had no power of attorney, or any other authority whatever, from Marsden Campbell to sell the premises and to execute the deed in the complaint mentioned, in said Campbell's name, which the defendant denies, and, to the contrary thereof, avers that the said William C. Lord, at the time of the execution of said deed, had a power of attorney, under the hand and seal of said Marsden Campbell, authorizing and empowering him to sell the said land and to make the said deed, as the attorney in fact of the said Campbell, and in his name.

3. It is admitted that Marsden Campbell removed from this State to Louisiana in the year 1834, and that he died intestate, but not in the year 1844, as alleged. This defendant is informed and believes, and therefore he avers, that the said Campbell died on the 18th day of October, 1841.

4. That the allegation of the seventh and eighth articles of the complaint are admitted to be true.

5. This defendant has no knowledge or information sufficient to
31 form a belief as to whether or not the persons named in the ninth article of the complaint are the heirs-at-law of Alice Heron.

6. This defendant has no knowledge or information sufficient to form a belief as to any of the matters of fact alleged in the tenth article of the complaint.

7. It is admitted that Frederick J. Swann, Rebecca W. Swann, Lucy Waddell, Ann Swann, and Mary Hill are the children of Frances Swann, who were living at the time of her death. But this defendant hath no knowledge or information sufficient to form a belief as to whether or not the said Frances Swann and William & Mary McKenzie were the only issue and heirs at law of Alice Heron at her death.

8. The allegations of the 12th article of the complaint are admitted to be true.

9. This defendant, admitting all the other allegations of fact contained in the 13th article of the complaint, alleges that he has no knowledge or information sufficient to form a belief [as] to whether or not the dates of the respective births of Frederick J. Swann, Lucy Waddell, Rebecca M. Swann, Ann Swann, and Mary Hill are truly and correctly stated therein, and prays that plaintiffs may be held to strict proof thereof.

10. This defendant admits that he is in possession of, and to so much, and only so much of, the land described in the deed from William C. Lord and Marsden Campbell, executors of John R. London, and John Swann and wife to Erastus Buck, as is embraced in the following boundaries,
to wit: Beginning in the eastern line of Front street, between
32 Market street and Dock street, at the southern line of an alley which runs from Front to Second streets; running thence with said line of Front street southwardly about forty-three feet to Levi A. Hart's line; thence with Hart's line eastwardly ninety-eight feet; thence with Hart's other line northwardly thirty-four feet to the southern line of said alley; thence with the said line of said alley westwardly ninety-eight feet to the beginning; and this defendant disclaims title to all the residue of

the land in the said deed described, and avers that he is not now nor never has been in the possession of any of the residue of said land.

11. That this defendant does not wrongfully withhold the possession of said land from the plaintiffs, but holds the same rightfully and by good title.

Second. For a second defense:

1. That this defendant purchased the land of which he has above admitted himself to be in possession from one Ronald McDougall at and for the price of $5,500, which was its full and fair value; and that he paid the said purchase-money and took a deed from the said McDougall on the 7th day of July, 1853, and that at the time of paying said purchase-money and the taking said deed, and even up to the commencement of this action, he had no knowledge, notice, or information whatsoever of any right, title, or claim to the said land on the part of the plaintiffs, or any other person except the said McDougall.

Third. For a third defense:

33 1. That the right of action in the complaint alleged did not accrue to the plaintiffs within seven years before the commencement of this action.

Fourth. For a further defense:

That the defendant and those under whom he claims have had and held continuous, open, and notorious adverse possession of said land ever since the year 1843 under a regular and connected chain of conveyances, and that all and every right of entry and right of action whatsoever of the plaintiffs was by reason thereof, and before the commencement of this action, *tolled precluded* [totally precluded] and forever barred.

Fifth. For a fifth defence:

1. That *that* the failure of the said Marsden Campbell to join with the said William C. Lord and John Swann and wife, Frances, in the execution of said deed to Erastus Buck, if any such failure there was (which this defendant denies) made only a case of a defective execution of the power of sale and conveyance contained in the said will of Alice Heron; and this court will aid, remedy, and complete the said defective execution in favor of this defendant who is purchaser for full value, and without notice.

Sixth. For a sixth defence:

That the defendant, and those under whom he claims, while holding the said lands under a title which he and they believe to be good, have made permanent improvements thereon to the value of thirty-six hundred

34 dollars, and at the time of making the same he and they had no notice, knowledge, or information of the title under which the plaintiffs claim. And the defendant prays he may be allowed for the said improvements over and above the value of the use and occupation of the said land.

M. LONDON,
GEO. DAVIS,
Def's Att'ys.

George Myers, being duly sworn, makes oath that the foregoing answer is true to his knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

GEORGE MYERS.

Subscribed and sworn this 8th day of September, 1877, before me.
[SEAL.] LAWSON E. RICE,
Notary Public.

STATE OF NORTH CAROLINA,
County of New Hanover:

George Myers being duly sworn, make' oath and says that the foregoing answer as amended in the sixth article thereof is true to his knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

GEO. MYERS.

Sworn and subscribed before me this 12th March, 1878.
[SEAL.] JNO. D. TAYLOR,
Clerk Superior Court New Hanover County.

35 Superior court of law for Columbus County, fall term, 1877.

Present and presiding the Hon. W. A. Moore, judge.

FREDERICK J. SWANN & OTHERS
against
GEORGE MYERS AND OTHERS.

Cause continued.

Superior court, fall term, 1877.

NORTH CAROLINA,
Columbus County:

FREDERICK J. SWANN & OTHERS
vs.
GEORGE MYERS & OTHERS.

Order in this case. Defendant to amend the 6th article of his answer.

On motion of Thomas H. Sutton, one of the plaintiffs' counsel, it is ordered that the defendant, Myers, amend the 6th article of defenc' set up in his answer, and specifically set forth what claim he makes for permenant improvements. That *that* he serve a copy thereof on D. J. Devane, esq., one of the plaintiffs' counsel, by or before the 1st day of November, 1877. And the plaintiffs have leave to reply to amended answer if they see fit, and if they do so reply to serve a copy on one of the defendants' counsel in the city of Wilmington, N. C., by or before the 1st day of December, 1877.

W. A. MOORE, *Judge, &c.*

36 *Petition for transfer of suit to federal court.*

In the superior court of Columbus County, State of North Carolina.

FREDERICK J. SWANN, ALEXANDER D. WADDELL and wife Lucy, Frederick W. Swann and wife Rebecca, Ann Swann, and Arthur J. Hill and wife Mary,

vs.

GEORGE MYERS, F. J. LORD AND OTHERS.

To the honorable the judge of the superior court of Columbus County, State of North Carolina:

Your petitioner, George Myers, respectfully shows that he is defendant in the foregoing entitled suit, and that the same was commenced against him on or about the 19th day of May, 1873, in the superior of New Hanover County, and removed by the plaintiffs to the superior court of Columbus County, and a verdict and judgment was rendered in favor of your petitioner, and plaintiffs appealed to the supreme court of the State, and the judgment of the said superior court was reversed by the supreme court and a new trial ordered. Your petitioner further shows that there is and was at the time said suit was brought a controversy therein between your petitioner and the said plaintiffs, who are citizens of North Carolina; that your petitioner then was and still is a citizen of the State of New York, and resident thereof, though your petitioner is now and has been for some months abiding in Wilmington *in said in this State* [in this said State] for a temporary purpose only, and has not abandoned his citizenship or
37 residence as a citizen of New York, and has no intention of becoming a citizen or resident of North Carolina; that said action was brought by the said plaintiffs for the purpose of recovering the possession of a certain lot of land in the city of Wilmington, upon which is situated a brick store-house, and to recover damages for a sum exceeding five thousand dollars, and that the matter in dispute in this suit exceeds the sum of five hundred dollars, exclusive of cost. Your petitioner further represents that this suit is now pending for trial in this honorable court, and that your petitioner desires to remove the same into the circuit court for the eastern district of North Carolina in pursuance of the act of Congress in that behalf provided, to wit, Revised Statutes of the United States, section 639, subdivision 3. Your petitioner further says that he has filed the affidavit required by the statute in such cases, and offers herewith his bond, executed by Levi A. Hart, as security, in the penal sum of five hundred dollars, conditioned as by said act of Congress required.

Your petitioner therefore prays that said bond may be accepted as good as [and] sufficient, according to said act of Congress, and that the said suit may be removed into the next circuit court of the United States in and for the said eastern district of North Carolina, pursuant to the aforesaid act of Congress in such case made and provided, and that no further proceedings may be had thereon in this court, and your petitioner will ever pray, &c.

GEORGE DAVIS,
M. LONDON,
Attorneys for Petitioner.

38 STATE OF NORTH CAROLINA,
New Hanover County:

George Myers, being duly sworn, make' oath that the foregoing petition is true to his knowledge, except as to matters therein stated on information and belief, and as to those matters, he believes it to be true.

GEORGE MYERS.

Sworn to & subscribed before me this 11th day of March, 1878.
[SEAL.] JOHN D. TAYLOR,
Clerk Superior Court, New Hanover County.

Affidavit for removal.

In the superior court of Columbus County, State of North Carolina.

FREDERICK J. SWANN, ALEXANDER D. WADDELL and wife Lucy, Frederick W. Swann and wife Rebecca, Ann Swann, and Arthur J. Hill and wife Mary,
vs.
GEORGE MYERS, F. J. LORD, AND OTHERS. } Affidavit.

STATE OF NORTH CAROLINA,
County of New Hanover:

I, George Myers, being duly sworn, do say that I am one of the defendants in the above-entitled cause; that I have reason to believe, and do believe, that from prejudice and local influence, I will not be able to obtain justice in said State court.

Subscribed by the said George Myers in my presence, and by
39 him sworn to before me, at Wilmington, this 11th day of March, A. D. 1878.

GEORGE MYERS.

Sworn and subscribed before me this 11th day of March, 1878.
JNO. D. TAYLOR,
Clerk Superior Court, New Hanover County.

STATE OF NORTH CAROLINA,
Columbus County:

Superior court, spring term, 1878.

FREDERICK J. SWANN, ALEXANDER D. WADDELL and his wife Lucy, and others, plaintiffs,
against
GEORGE MYERS, F. J. LORD, AND OTHERS, DEFENDANTS.

George Myers, one of the above-named defendants, having, by his counsel, moved at the above-mentioned term of this court, under act of Congress, on the petition, affidavit, and bond of the said George Myers, filed in this cause, which bond is deemed by *by* the court to be sufficient, that the said action be removed from this court into the next circuit court of

the United States in and for the eastern district of North Carolina, and the said motion coming on to be heard, and being heard on the said petition and affidavits, and the pleadings in said action, and argument of counsel, and it appearing to the satisfaction of the court that all the plaintiffs and the defendants, except the defendant George Myers, are residents and citizens of the State of North Carolina, and are necessary parties in this cause; and it appearing to the satisfaction of the court that in this action there cannot be a final determination of this controversy, so
40 far as it concerns the defendant George Myers, without the presence of the other defendants in said action, as parties in the cause, which defendants have not joined with the said George Myers in his petition to remove said cause, nor asked for the same: It is therefore considered and adjudged by the court that the said motion for removal of said action be, and the same is hereby, denied and disallowed; and that the said cause is retained for trial in the superior court of Columbus County, in the State of North Carolina, from which judgment the defendant George Myers craves appeal to the supreme court of North Carolina. Appeal granted. Notice of appeal waived.

Appeal bond in the sum of fifty dollars, filed and adjudged sufficient.

M. L. EURE,
Judge Presiding.

Bond.

STATE OF NORTH CAROLINA:

Whereas at the superior court of Columbus County, at spring term, 1878, his honor M. L. Eure, judge presiding, in the case of F. J. Swann and others, plaintiffs, vs. George Myers and others, defendants, pending for trial in said court, George Myers, through his counsel, filed a petition for the removal of the cause to the circuit court of the United States, and filed his bond with security, and also an affidavit for the removal, as provided by law; and whereas his honor the presiding judge refused the motion to remove; and whereas his honor, upon motion of the said
41 George Myers' counsel, allowed said defendant to appeal to the supreme court from said order refusing said motion upon his entering into an undertaking in the sum of fifty dollars to pay the costs of the appellate court should judgment be rendered against him: Now, therefore, we, the undersigned, undertake that the said appel'ant shall pay all costs and damages that may be awarded against him on such appeal, not to exceed fifty dollars.

GEORGE MYERS.
LEVI A. HART.

Witness:
HENRY S.

Judgment.

STATE OF NORTH CAROLINA:

Supreme Court. June term, 1878. No. 94. Columbus County.

F. J. SWANN ET ALS.
vs.
GEORGE MYERS ET ALS.

This cause coming on to be argued upon the transcript of the record

from the superior court of Columbus County; upon consideration whereof this court is of the opinion that there is error in the record and proceedings of said superior court. It is therefore considered and adjudged by the court here that the opinion of the court as delivered by the honorable Will. B. Rodman, justice, be certified to the superior court to the
42 intent that further proceedings may be had according to law. And it is considered and adjudged further that the *the* defendants, the said George Myers and others, do recover from the plaintiffs, the said F. J. Swann, Alexander D. Waddell, Lucy Waddell, Frederick W. Swann, Ann Swann, and Mary Hill, the costs of the appeal in this court incurred, to wit, twenty-six $\frac{50}{100}$ dollars ($26.50), and let execution issue therefor.

A true copy.

Test:

WM. H. BAGLEY, *Clerk.*

STATE OF NORTH CAROLINA,
Columbus County:

Superior court. Fall term, 1878.

F. J. SWANN AND OTHERS, PLAINTIFFS,
against
GEORGE MYERS AND OTHERS, DEFENDANTS,

The supreme court of North Carolina having ordered the removal of the above case to the circuit court of the United States for the eastern district of North Carolina, and it appearing to the satisfaction of the court that the defendants, except George Myers, are merely nominal parties as trustees, upon whom notice had been served and a request made that they join as parties plaintiff, which they declined to do:

It is therefore ordered and adjudged that the case as it is now constituted be removed to the circuit court of the United States for the eastern district of North Carolina, to be held at Raleigh on the last Monday
43 in November next. The clerk of this court will make out a transcript of all the proceedings had in the above cause, and certify the same to the clerk of said court.

R. P. BUXTON,
Judge Presiding.

Bond for removal to United States court.

Know all men by these presents that we, George Myers, of the State of New York, as principal, and Levi A. Hart, of Wilmington, North Carolina, as surety, are hereby held and firmly bound unto Frederick J. Swann, Alexander D. Waddell and his wife Lucy, Frederick W. Swann and his wife Rebecca, Ann Swann, Arthur J. Hill and wife Mary, in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

The condition of the above obligation is such that if the said George Myers shall enter and file, or cause to be entered and filed, in the next circuit (court) of the United States in and for the eastern district of North

Carolina, on the first day of its session, copies of all process, pleadings, depositions, and other proceedings in a certain suit or action now pending in the district (superior) court of the county of Columbus, and State of North Carolina, in which Frederick J. Swann, Alexander D. Waddell and wife, Ann Swann, and others are plaintiffs, and George Myers, F. J. Lord, and others are defendants, and shall do such other acts as by the
44 acts of Congress in that behalf are required to be done upon the removal of such suit from said State court into the said United States court, then this obligation to be void; otherwise of force.

Witness our hands and seals this 11th day of March, 1878.

GEO. MYERS. [SEAL.]
LEVI A. HART. [SEAL.]

STATE OF NORTH CAROLINA,
County of New Hanover:

I, Levi A. Hart, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of North Carolina, and a property holder therein; that I am worth (the) sum five hundred dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the State of North Carolina liable to execution of the value of more than five hundred dollars.

Subscribed in my presence by Levi A. Hart, and by him sworn before me this 11th day of March, 1878.

[SEAL.]

J. D. TAYLOR,
Clerk Superior Court of New Hanover County.

Commission to take depositions.

STATE OF NORTH CAROLINA:

To Charles E. Grose, esq'r, of the city of Hartford, and State of Connecticut:

We, having confidence in your prudence and fidelity, do hereby authorize and empower you to cause Silas Buck, a witness in behalf of
45 the defendant, to come before you, at such time and place as you shall appoint, and him to examine on oath concerning all such matters and things as he may know respecting a controversy now depending in the superior court of Columbus County, and State of North Carolina, wherein Frederick J. Swann, Alexander D. Waddell and wife Lucy, and others are plaintiffs, and George Myers, defendant, as well on the part of said defendant as the said plaintiffs, and his deposition to take in writing, under your hand and seal, and send the same to our superior court to be held for the county of Columbus, at the court-house in Whiteville, on the fourth Monday after the second Monday in February, A. D. 1876.

Witness William M. Baldwin, clerk of our said court, at office, the 23d day of February, A. D. 1876.

[SEAL.]

W. M. BALDWIN,
Clerk Sup'r Court, Columbus County.

A.—*Deposition of Silas Buck.*

STATE OF CONNECTICUT,
County and City of Hartford:

By virtue of the annexed commission to me directed, and issuing from the superior court of Columbus County, in the State of North Carolina, in a certain civil action therein depending, wherein Frederick J. Swann, Alexander D. Waddell, wife Lucy, Frederick W. Swann and wife Rebecca, Ann Swann, Arthur J. Hill and wife Mary, are plaintiffs, and George Myers defendant, I, Charles E. Grose, the commissioner therein
46 named, on this Friday, the 10th day of March, 1876, did cause the witness SILAS BUCK to come before me at my office, No. 80 State street, in the city of Hartford and State of Connecticut, and the said witness being by me first duly sworn upon the Holy Evangel*ist* of Almighty God to tell the truth, the whole truth, and nothing but the truth touching the matter in controversey in said action, did depose and say as follows, to wit:

In answer to the first interrogatory he said:

Ques. 1. What is your name, age, residence, and occupation?

Ans. 1. My name is Silas Buck; my age is fifty-seven years; my residence, 41 Grand st., in the city and county of Hartford and State of Connecticut; my occupation is that of carriage-maker.

To the second interrogatory he said:

Ques. 2. State whether you are any relative, and, if so, what relation, of Erastus Buck, who formerly did business in Wilmington, North Carolina.

Ans. 2. Said Erastus Buck was my father.

To the third interrogatory he said:

Ques. 3. Is said Buck living? If not, state when he died.

Ans. 3. Said Erastus Buck died in the month of August, 1839.

To the fourth interrogatory he said:

Ques. 4. State whether he left any children surviving; him if so, give the names of all of them.

Ans. 4. He left four children surviving him, to wit, Silas Buck, George M. Buck, Henry E. Buck, and Charlotte A. Buck. Charlotte A. Buck has since intermarried with Henry Dyer; all of said four children are still living.

47 To the fifth interrogatory he said:

Ques. 5. If he left a widow surviving him, give her name also.

Ans. 5. He left a widow named Eunice Buck. She died, I think, in 1859.

To the sixth interrogatory he said:

Ques. 6. Were you acquainted with a lot of land in *in* Wilmington, North Carolina, which Erastus Buck purchased from John Swann and wife and the trustees of Mrs. Swann?

Ans. 6. Yes; I was acquainted with it. I knew at the time when my father purchased it, but I cannot state in just what year it was.

To the seventh interrogatory he saith:

Ques. 7. If you shall answer in the affirmative, state who had the possession and control of that lot from the death of said Erastus Buck up to the sale by the sheriff in 1843.

Ans. 7. I was in Wilmington only one year after my father died. Will-

iam A. Wright, of said Wilmington, was appointed administrator of my father's estate. He first rented it from year to year for four years. Myself and my uncle Isaac Wells, partners as Wells & Buck, rented a part of said lot of said administrator the first year, and P. W. Fanning rented another shop on the same lot. In the distribution of my father's estate a portion of said lot was set out to my mother, and she rented it to a man by the name of Wood, I think from Rhode Island, who took a lease of it for the balance of my mother's life. Said portion of the lot subject to my mother's life estate was sold at auction for the benefit to a man by
the name of Parsley. After I left Wilmington in August, 1840, I
48 do not know who had the actual possession and control of said lot; and further, deponent saith not.

SILAS BUCK.

The foregoing deposition was by me reduced to writing in the presence of the witness and read over to him, and was subscribed by him in my presence.

[SEAL.]

CHARLES E. GROES,
Commissioner and Notary Public.

B.—*Alice Heron's will.*

In the name of God, amen.

I, Alice Heron, of Wilmington in North Carolina, being of sound and perfect mind and memory, but considering the uncertainty of this mortal life, do make and publish this my last will and testament in manner and form following (that is to say): First, I give and bequeath unto my nephew, Marsden Campbell, to himself, executors, administrators, and assigns, forever, the following negro slaves: Primus, Sally, John, Sarah, and Lucy, but subject to the payment of all my just debts due or owing at the time of my decease, and my executors hereinafter named are hereby authorized and directed to sell and dispose of the above-mentioned slaves, if necessary, for the payment of my debts of whatsoever nature. I also give and devise to my nephew, John R. London, to himself, his heirs, and assigns, forever, in fee-simple, all that lot of ground in the town of Wilmington bounded to the northward by the lot whereon the said
49 John R. London's office now stands; to the westward by Front street; to southward by Chestnut street, and to the eastward by Second street. I give and bequeath to my grandchildren William and Mary McKenzie, as a testimonial of sincere affection and esteem, each a gold watch, to be purchased and paid for by my executors, and the amount deducted from the proceeds of property hereinafter directed to be sold.

I give and devise to my executors hereinafter appointed all that tract of land lying between the southern boundary of Wilmington and the Greenfield plantation; also all my land lying on or near Long Creek, in the county of New Hanover, to be sold by my executors, or the survivor or the executor of such survivor, and the money arising from the sale of said tract or tracts (first deducting my legacies to Wm. and Mary McKenzie) to be loaned upon interest until it shall amount to fifteen hundred dollars, and then such sum to be expended by my executors, or the survivor of the executor of such survivors, in the improvement of my

lots hereinafter devised in trust to the use and benefit of my granddaughter Frances Swann. I give and devise all the residue of my real estate of whatsoever nature and kind to John Waddell and John R. London, and the survivor and the executor of such survivor, to the use of said John Waddell and John R. London, and the survivor and executor of such survivor, in trust and confidence for the several interests and purposes, provisions and limitations, hereinafter expressed and declared; that is to say,

50 to the separate use and behoof to the said Frances Swann for and during her life, and after her death, in trust as aforesaid, to the use of such child or children as may be alive at her decease, or in case of my granddaughter Frances demise without children or a child, but leaving the issue of such child or children, then to the uses of such children or a child, but leaving the issue of such child or children, then to the uses of children or child as last mentioned. Provided, however, that if at the death of my granddaughter Frances neither her issue or the child or children of such issue shall be at the age of twenty-one years, or after the death of my granddaughter none of her issue or the children of her issue shall arrive to the age of twenty-one, then, and then only, to the use of those who would have inherited my estate had Frances died without issue or children of such issue in my life-time.

I give and bequeath all the rest of my negro slaves to John Waddell and John R. London, and the survivor, and the executor of such survivor, in trust to and for the several uses, purposes, and limitations declared as above.

I give and bequeath all the residue of my personal estate to my granddaughter Frances.

And it is *will* my will that the trustees aforesaid, and the survivor, and the executor of such survivor, in the soundness of their discretion, may join with the cestui que use or guardian of cestui que use in making any conveyance of the above property settled in trust as aforesaid as may to them seem proper.

I hereby appoint John Waddell and John R. London my executors, who, as trustees aforesaid, may retain funds to insure my property, and in

51 case of accident m'y apply the insurance money to the improvement of the real estate to them devised as trustees; and it is expressly my meaning (and by no implication or construction to be otherwise understood) that the trustees as aforesaid shall in no wise be liable on any account unless for rents or profits by them actually received, and that over and above what may be by them retained for insurance and necessary disbursements.

In witness of all which I have hereunto set my hand and seal this second of May, anno Domino 1811, XXXV Independence.

A. HERON. [SEAL.]

Signed, sealed, and declared by the above-named Alice Heron to be her last will and testament, in the presence of us, who have hereunto subscribed our names as witnesses in the presence of the testatrix.

THOMAS WRIGHT.
JAMES S. GREEN.

County court, New Hanover County, May term, 1813.

The execution of this will was proven by James S. Green, one of the

subscribing witnesses thereto, and ordered to be recorded; and at the same time John R. London qualified as executor thereto.

Witness:

THOMAS F. DAVIS, *Clk.*

52 New Hanover County, in the probate court.

I hereby certify that the foregoing is a true and literal [?] of the original will of Alice Heron, now on file in this court, said will being recorded in book of wills A, page 317.

In testimony whereof I have hereunto set my hand and affixed my official seal at office, in Wilmington, this 4th day of September, A. D. 1871.

[SEAL.]

J. C. MANN,
Judge of Probate.

Bill of costs.

Superior court, Columbus County.

FREDERICK J. SWANN AND OTHERS, PLAINTIFFS,
against
GEORGE MYERS AND OTHERS, DEFENDANTS.

Bill of costs, New Hanover County:

F. & D.	$2 00
Sheriff Black	60
Clerk Mann	8 30
" Heaton	17 50
	$28 40

Columbus County:

Clerk W. M. Baldwin	$34 15
Sheriff J. W. Taylor	3 00
53 Sheriff Manning	$6 60
Attorney	10 00
Witness Wm. Larkins	6 60
" L. A. Hart	6 60
" S. D. Polly	22 70
	$118 05

Certificate.

I, William M. Baldwin, clerk of the superior court in and for the county of Columbus, do hereby certify that the foregoing transcript of the case Frederick J. Swann and others, against George Myers and others, is a true transcript from the original papers on file in the superior court clerk's office of said county.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Whiteville, this 21th day of November, A. D. 1878.

W. M. BALDWIN, *C. S. C.*

54 *Proceedings of November term*, 1878.

And at the November term, 1878, of said court, begun and held for said district, in the city of Raleigh, on the last Monday of November, being the 25th day of said month, before the honorable Hugh L. Bond, circuit judge, presiding, and the honorable Geo. W. Brooks, district judge of said district, the following proceedings are had and entered of record in said cause, to wit: Motion by defendant for continuance. Motion argued and allowed.

Proceedings of June term, 1879.

And at the June term, of said court, 1879, begun and held in the city of Raleigh, for the district aforesaid, on the first Monday in June, being the 2nd day of said month, before the honorable Hugh L. Bond, circuit judge presiding, and the honorable Geo. W. Brooks, district judge, come the parties aforesaid, by their attorneys, and thereupon further day is given to the parties, to wit, the last Monday in November, 1879.

55 *Proceedings of November term*, 1879.

At which last-mentioned day, at the court room of said court, in the city of Raleigh, before the honorable Hugh L. Bond, circuit judge, presiding, and the honorable Geo. W. Brooks, district judge, the parties aforesaid, by their said attorneys come, and thereupon the following judgment is rendered and entered of record in said cause, to wit:

Judgment remanding the cause.

FREDERICK J. SWANN AND OTHERS
against
GEORGE MYERS AND OTHERS.

This action coming on for hearing upon a motion, after notice to the defendants, to remand the same to the State court, and said motion having been debated by counsel, the court is of opinion that the action in its present form cannot be maintained in this court; and it is ordered and adjudged that the same be remanded to the superior court of Columbus County, North Carolina, to be therein proceeded with according to law.

It is further ordered and adjudged that in case an appeal or writ of error shall be prosecuted upon this order, remanding the action to the State court, that the defendant, George Myers, give a justified bond for a supersedeas in the sum of ten thousand dollars, to be passed upon by the
56 clerk, and that if a supersedeas is not asked for that he give a justified bond for five hundred dollars for costs.

(Signed) HUGH L. BOND, *C't Judge.*

Writ of error applied for and granted; and it is considered by the court, that the defendant, George Myers, pay all the costs incurred herein in this court, and that execution issue therefor, if need be.

57 *Citation.*

UNITED STATES OF AMERICA, *ss*:

To Frederick J. Swann, Alexander D. Waddell & wife Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend the said Frederick W. Swann; Ann Swann, and Mary Hill, William S. London, Henry A. London, jr., Frank London, Ann M. Zimmerman, John R. London, Fred. H. London, Snowdon & Eliza London his wife, William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett. jr., M. J. De Rossett, Catherine G. Meares, Graham Davis and Alice his wife, Charles D. Myers and Eliza his wife, and Gabriella De Gordon De Rossett, Robert Cowan De Rossett, and Kate De Rossett, and Frederick J. Lord, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of North Carolina, wherein George Myers is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

58 Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 30th day of March, in the year of our Lord one thousand eight hundred and eighty.

N. J. REDDICK,
Clerk U. S. Circuit Court, Eastern District of North Carolina.

(Endorsed:)
Service accepted March 30th, 1880, at Raleigh, N. C.
BATTLE & MORDECAI,
Of Counsel for Defendants in Error.

59 *Assignment of errors.*

Supreme Court of the United States.

F. J. SWANN AND OTHERS
against
GEORGE MYERS.

Exceptions of the defendant to the judgment and order of the court.

The said George Myers, by his attorney, says that in the record and proceedings aforesaid there is manifest error in this:

That by the record and proceedings aforesaid it appears that the judgment of the court was that the said action be remanded to the superior court of Columbus County, North Carolina, to be therein proceeded with according to law; whereas by the law of the land said action could be well maintained in its present form in the said circuit court of the United States. The said George Myers prays that the judgment aforesaid may be

reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of said judgment.

GILLIAM & GATLING,
Def'd'ts' Attorneys.

59½ *Rejoinder.*

In the Supreme Court of the United States.

F. J. SWANN AND OTHERS
against
GEORGE MYERS.

And afterwards, the said F. J. Swann and others, by their attorneys, Battle & Mordecai, come and say there is no error in the record and proceedings aforesaid, or in giving the judgment aforesaid, and they pray that the Supreme Court of judicature may proceed to examine as well the record and proceedings aforesaid the matters aforesaid above assigned for error; and that the judgment aforesaid, in form aforesaid given, may be in all things confirmed.

BATTLE & MORDECAI,
Of Counsel for Def'd'ts in Error.

60 *Bond.*

Supreme Court of the United States.

FREDERICK J. SWANN, ALEXANDER D. WADDELL, and wife Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend the said Frederick W. Swann; Ann Swann, & Mary Hill, plaintiffs,
against
GEORGE MYERS, WILLIAM S. LONDON, HENRY A. London, jr., Frank London, Ann M. Zimmerman, John R. London, Fred. H. London, Snowden and Eliza London, his wife, William L. De Rossett, Thomas C. De Rossett, Armand J. De Rossett, jr., M. J. De Rossett, Catherine G. Meares, Graham Davis and Alice, his wife, Charles D. Myers and Eliza, his wife, and Gabriella De Gordon De Rossett, Robert Cowan De Rossett, and Kate De Rossett, infants under the age of 21 years, and Frederick J. Lord, defendants.

Know all men by these presents, that we, George Myers and L. A. Hart and H. A. Burr, of the city of Wilmington, North Carolina, are held and firmly bound unto Frederick J. Swann, Alexander D. Waddell
61 and wife Lucy, Frederick W. Swann, F. J. Swann, jr., Ann Swann, and Mary Hill, of said State of North Carolina, in the sum of five hundred dollars, to be paid to the said Frederick J. Swann, Alexander D. Waddell and wife Lucy, Frederick W. Swann, F. J. Swann, jr., Ann Swann, and Mary Hill, their executors and administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, ex-

ecutors, and administrators, firmly by these presents. Sealed with our seals. Dated this 8th day of January, 1880.

Whereas the above-named George Myers hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the eastern district of North Carolina, in the fourth circuit:

Now, therefore, the condition of this obligation is such that if the above-named George Myers shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEORGE MYERS. [SEAL.]
L. A. HART. [SEAL.]
HENRY A. BURR. [SEAL.]

62 UNITED STATES OF AMERICA,
State of North Carolina:

Before me, E. H. McQuigg, a commissioner duly appointed by the circuit court of the United States for the eastern district of North Carolina, come the said George Myers and L. A. Hart and Henry A. Burr, and being by me first duly sworn depose and say, each for himself, that he is worth the sum of one thousand dollars over and above all of debts, liabilities, and exemptions.

GEORGE MYERS.
L. A. HART.
HENRY A. BURR.

Sworn to and subscribed before me, at office, in the city of Wilmington N. C., this 8th of January, 1880.

[SEAL.] E. H. McQUIGG,
United States Commissioner, Eastern District of North Carolina.

63 *Certificate.*

I, N. J. Riddick, clerk of the circuit court of the United States in and for the eastern district of North Carolina, do hereby certify that the foregoing contain a full, true, and perfect transcript of the record of said court in the case of T. J. Swann and others against George Myers.

In testimony whereof I have hereunto set my hand and seal of said court at office, in the city of Raleigh, in said district, this 15th day of May, in the year of our Lord 1880, and of our Independence the 104th.

[SEAL.] N. J. RIDDICK, *Clerk.*

(Indorsement on cover:) No. 252. Mary E. Myers, widow of George Myers, deceased, in her own right and as next friend of Arthur H. Myers, Ethel P. Myers, and Elmer H. Myers, infant children and heirs at law of George Myers, deceased; Caroline Kellock & Cornelius M. Kellock, her husband, Robert C. Myers, George B. Myers, Kate M. Myers, and James C. Myers, heirs at law of George Myers, deceased, plaintiffs in error, vs. Frederick J. Swann, Alexander D. Waddell and wife Lucy, Frederick W. Swann, F. J. Swann, jr., by his next friend Frederick W. Swann, Ann Swann, et al. E. North Carolina C. C. U. S. Filed 17th August, 1880.

17 Wall. 346

In the Supreme Court of the United States.

No. 252.

MARY E. MYERS ET AL, PLAINTIFFS IN ERROR,
vs.
FREDERICK J. SWANN ET AL

In Error to the Circuit Court of the United States for the Eastern District of North Carolina.

T. T. CRITTENDEN,
FRANKLIN H. MACKEY,
Of Counsel for Plaintiffs.

In the Supreme Court of the United States.

No. 252.

MARY E. MYERS ET AL., PLAINTIFFS IN ERROR,
vs.
FREDERICK J. SWANN ET AL

In Error to the Circuit Court of the United States for the Eastern District of North Carolina.

At the spring term, 1873, of the superior court of New Hanover county, in the State of North Carolina, the defendants in error, Frederick J. Swann, Alexander D. Waddell and his wife Lucy, Frederick W. Swann and his wife Rebecca, Ann Swann, Arthur J. Hill and his wife Mary, filed their original complaint against George Myers, defendant, claiming certain real estate described in said complaint, Rec., pp. 4, 5 and 6, and asking judgment for possession of said real estate and $5,000 damages for withholding the same. At the June term, 1875, on motion of the plaintiffs it was ordered that this cause be removed for trial to the county of Columbus in said State. Rec., p. 7.

On the 13th day of March, 1876, in said superior court of said Columbus county, said cause was tried and verdict and judgment rendered thereon in favor of the defendant. Rule for new trial and rule discharged. Appeal taken to the Supreme Court; said judgment was reversed and new trial ordered. At the spring term, 1877, of said superior court of said Columbus county, an amended complaint was filed by leave of the court, making additional parties defendants in said cause, Rec., p. 9, *et seq.* To the amended complaint said defendant, George Myers, on the 8th day of September, 1877, filed his separate answer. Rec., p. 15.

On the 11th day of March, 1878, said defendant, George Myers, filed in said superior court of Columbus county, his petition, duly sworn to by him and accompanied by a proper and sufficient bond for the removal of said cause to the Circuit Court of the United States for the Eastern District of North Carolina, (Rec., pp. 19 and 20), which motion for removal was denied and disallowed by said court. (Rec., pp. 20 and 21.) From which judgment said defendant, George Myers, prayed an appeal to the Supreme Court of the State of North Carolina. And said Supreme Court, at its June term, 1878, reversed said last judgment (Rec., pp. 21 and 22) and at the fall term, 1878, of said superior court of Columbus county, it was ordered that this cause be removed to the Circuit Court of the United States for the Eastern District of North Carolina (Rec., p. 22), which was done.

At the June term, 1879, of said Circuit Court of the United States, by the order of said court, said cause was remanded to the said superior court of Columbus county to be therein proceeded with according to law, and from this judgment remanding said cause this writ of error is prosecuted. Rec., p. 28.

Since this cause was brought by writ of error to this court said George Myers departed this life and the cause was revived by order of this court in the names of the present plaintiffs in error.

Points.

1. The substantial controversy in this cause is between the representatives of George Myers, deceased, and the defendants in error.

2. If the original plaintiff in error, George Myers, was competent to sue the defendants in error in the Circuit Court of the United States, the representatives of said George Myers, though citizens of the same State as the defendants in error, may revive said action.

3. The facts that this action had been tried, judgment rendered thereon, and said judgment reversed by the Supreme Court of the State of North Carolina and sent back for a new trial thereof, did not preclude the removal of the cause to the Circuit Court of the United States.

1. The substantial controversy in this cause is between the representatives of George Myers, deceased, and the defendants in error.

To sustain this position it is only necessary to quote the opinion of Rodman, Justice, in the case of F. J. Swann et al. *vs.* George Myers et al., reported in 79 North Carolina Reports, 101, in which he says: "This is a motion by Myers, one of the defendants, to remove the action to the Circuit Court of the United States for trial upon the ground of prejudice or local influence under the act of the 2d of March, 1867. Rev. Stat. of U. S., Sec. 639, and 2 Abbott's Practice, 39.

All the plaintiffs are citizens and residents of North Carolina, as are all the defendants, except Myers, who is a citizen and resident of New York. If Myers were the only defendant, there would be no objection to granting his motion. We understand it to be settled, however, by the cases of the Sewing Machine Co., 18 Wall., 553; Vanver *vs.* Bryant, 21 Wall., 41, and Gardner *vs.* Brown, Ib., 36, that if the other defendants are necessary parties to the action without whose presence in court no full or final determination of the matter in controversy can be made, the defendant Myers is not entitled to have his motion granted. Then, are the other defendants, or any of them, such necessary parties?

For the intelligible consideration of this question it is necessary to state in a summary way the claims of the parties upon what seem to be the undisputed facts.

Alice Heron, being seized in fee of the land in question, made her will and died in 1813. By said will she devised the residue of her land (which included that in question) "to John Waddell and John R. London and the survivor,

and *the executor of such survivor*," in trust for the separate use of Frances Swann (her grandaughter) for life, with remainder to her children living at her death, and in default of children living at her death, in trust for the issue of her children, and in default of such issue, who arrive at the age of twenty-one, then to her own heirs.

By a subsequent clause of her will the testatrix provided as follows :

" And it is my will that the trustees aforesaid, and the survivor, and the executor of the survivor, in the soundness of their discretion, may join with the *cestui que use*, or guardian of *cestui que use*, in making any conveyance of the above property settled as aforesaid, as may to them seem proper."

Of the executors named, London alone qualified. He survived Waddell and died, leaving a will by which he made Marsden Campbell and William C. Lord his executors.

On the 12th of February, 1836, a deed, professing to be under the power in the will, was made by John Swann and the said Frances, his wife, and the said Lord, and the said Campbell, by said Lord, as his attorney, conveying said land to one Buck, under whom defendant Myers claims ; and he, and others, who claim under him, have been in possession ever since.

There is no evidence other than that appearing in the deed that Lord was the attorney of Campbell. Lord survived Campbell ; the defendants (except Myers) are his heirs, and the plaintiffs are the children or issue of Frances Swann and also heirs of Alice Heron. Frances Swann died in 1871.

The case came before this court at June term, 1876, on an appeal by the plaintiffs. (75 N. C., 585.) The *decision* of the court granted a new trial. The opinion of the court, however, held :

(1.) That the deed to Buck was not a valid execution

of the power, for want of execution by Campbell, and it consequently did not convey a fee simple.

(2.) That it did convey the equitable life estate of Frances Swann, and that the possession of Buck and his assignee did not become adverse until her death in 1871.

(3.) It expressed a doubt as to whether, upon the death of Lord, the bare legal estate descended to his heirs (the defendants, except Myers), or reverted to the heirs of Alice Heron. This question, however, is merely one of form, and of no practical importance, for if there be a trust outstanding for the plaintiffs, the court will compel the trustees, whoever they may be, to hold the legal estate for them. It seems sufficiently clear though that by force of section 45 of chap. 119 of Bat. Rev. (Wills), by which all devises are construed to be in fee unless otherwise expressed, that Lord took a fee, and the legal estate descended to his heirs.

If this court shall decide that the case cannot be removed, it can only be on the ground taken by the plaintiffs that the defendants (except Myers) are trustees and hold the legal estate; which would be to decide that they are trustees for the plaintiffs and bound to convey to them. It is not and cannot be contended that the said defendants are trustees for Myers. His claim is and must necessarily be that the legal estate passed to Buck, either by the deed of 1836, or by an adverse possession beginning at that time, and is now in him as the assignee of Buck. The only substantial question in the case is whether the said defendants are trustees. By refusing to remove the case on the ground that said defendants are trustees, and therefore necessary parties to a full determination of all matters in controversy, this court would decide against the defendant the only matter in controversy; it would refuse to him a trial of his claim by a court which he believes more free from prejudice and local influence than a State court, because, in our opinion,

he has no legal claim. We are of the opinion that the title of the plaintiffs can be tried and adjudged in the absence of the said defendants who are alleged to be trustees for the plaintiffs, and whose estate, if any, is merely a nominal one. The plaintiffs claim only an equitable estate, and can, under our law, recover upon that. They might have joined the nominal defendants with them as plaintiffs, and they may be more naturally arranged on that side. That they have been put on the same side with the defendant Myers, with whom they have no community, but an opposition of interest, ought not to prejudice his rights. Their interests, as far they have any, are with the plaintiffs, who claim them as their trustees, and such they are, if they have any legal interest at all; and if those defendants had been made nominally plaintiffs as substantially they are, there could be no question as to the right of Myers to remove the case.

We think this motion should be allowed, and the case removed to the Circuit Court of the United States, and an order will issue to the superior court of Columbus to that effect."

If the real controversy is between citizens of different States, the case is within the constitutional grant of Federal judicial power, notwithstanding some of the adversary parties may happen to be citizens of the same State.

Donohoe *vs.* Mariposa Land Co., 5 Sawyer, 170.

Dillon on Removal of Causes, p. 30.

Wood et al. *vs.* Davis, 18 How., 467.

Removal Cases, 100 U. S. Rep, pp. 457–482.

Barney *vs.* Latham, 113 U. S. R., 205–216. (The decision in this case rendered in October, 1880, disposes, we think, of all the questions involved in the case at bar.)

Hewitt *vs.* Phelps, 105 U. S. R., S. C., pp. 313 *et seq.*

"The intention of Congress—plainly expressed in the act of March 3, 1875, was that where the main controversy was between citizens of different States, it was removable, and carried with it all the incidents; and that a mere incident would not prevent the case from being removed."

103 U. S. R., pp. 212–216; Id., pp., 335–336.

Donohoe *vs.* Mariposa Land Co., 5 Sawyer, 170–171.

Dillon on Removal of Causes, p. 35, note.

Goodenough *vs.* Warren et al, 5 Sawyer, 497, and cases cited (1879). (In this case the question arose under Sec. 639, U. S. Rev. Stat., and Sawyer, J., concurred with Judge Deady.)

Girardy *vs* Moore et al., 5 Cent. L. J., 78, 79 (1877).

Wormsee *vs.* Dahlman, The Reporter, Vol. 7, 740–1 (1879).

Taylor et al. *vs.* Rockafeller et al., The Reporter, Vol. 6, pp. 226–230 (1878).

2. If the original plaintiff in error, George Myers, was competent to sue the defendant in error in the Circuit Court of the United States, the representatives of said George Myers, though citizens of the same State as the defendants in error, may revive said action.

Clarke, adm'r, *vs.* Mathewson et al., 12 Peters, 164.

The facts that this action had been tried, judgment rendered and said judgment reversed by the Supreme Court of the State of North Carolina, and sent back for a new trial thereon, did not preclude the removal of the cause to the Circuit Court of the United States.

Hewitt *vs.* Phelps, 105 U. S. Rep., 393.

T. T. CRITTENDEN,
FRANKLIN H. MACKEY,
Of Counsel for Plaintiffs in Error.

176 & 746

OFFICE SUPREME COURT U. S.
FILED
APR 13 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 252.

MYERS AND OTHERS *vs.* SWANN AND OTHERS.

BRIEF FOR THE DEFENDANTS IN ERROR.

S. F. PHILLIPS,
For Defendants in Error.

JUDD & DETWEILER, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 252.

MYERS AND OTHERS *vs.* SWANN AND OTHERS.

BRIEF FOR THE DEFENDANTS IN ERROR.

The *error* assigned in this case questions an order *remanding* to a State court an action previously *removed* therefrom, under the 3d clause of section 639 of the Revised Statutes; *i. e.*, the "local-prejudice" statute of 1867, (below, p. 4.)

The action was brought in the superior court of New Hanover county, North Carolina, returnable to June term, 1873. Inasmuch as at that time that court held *four* terms during the year, (Battle's N. C. Digest, p. 140,) and as under the *code* of the State actions were returnable in term time, and stood for trial at the term succeeding the return, (Battle, p. 248,) this action was *pending for trial* at the time of the passage of the Removal act of 1875. Therefore, this application to remove, which was made in March, 1878, (after the cause had been removed for trial to another county in North Carolina, and also after it had been tried, and such trial had been set aside in the State supreme court,) can in no event rest upon that act. The latest opportunity for a removal under the act of 1875 was at March term, 1875, of New Hanover court.

Removal cases, 100 U. S., 457.
Bible Society *vs.* Grove, 101 U. S., 610.
Babbitt *vs.* Clark, 103 U. S., 606.

Inasmuch, also, as the act of 1875 repealed the second clause of section 639 (*i. e.*, the Removal act of 1866, Hyde *vs.* Ruble, 104 U. S., 407,) there is no authority for the application in question other than that to be found in the statutory provision expressly relied upon therein; that is, section 629, clause 3, (given below.)

One principal question, therefore, is whether such provision is sufficient.

An outline of the case upon the record is as follows:

By virtue of a will made in 1811, certain lands were devised to trustees, in trust for a Mrs. Swann for life and afterwards for the plaintiffs in fee; a power to sell the fee was also given to Mrs. Swann, in conjunction with her trustees; she attempted to sell accordingly, but executed the power defectively, (Swann *vs.* Myers, 75 N. C., pp. 595, 596;) the right so conveyed, together with possession thereunder, in the end devolved upon the defendant Myers; and Mrs. Swann has recently died, as also have the original trustees—the defendants other than Myers having succeeded to the rights and duties of the latter. The relief demanded is, *possession* as against Myers and *title* as against the trustees.

Originally the action was against Myers alone, and demanded only *possession;* but upon its coming before the supreme court of North Carolina, after the trial above referred to, that tribunal suggested that the trustees should be brought in, so that the legal title might be represented, and might also, in case of their success, be adjudged to the plaintiffs. Thereupon the complaint was amended by adding the trustees (who had refused to become *plaintiffs*, folio 25,) as defendants, and by demanding also title. The trustees did not answer; but Myers, by leave, amended his former answer, and at the same term also applied for this removal. It was refused in the superior court, but upon appeal to the State

supreme court was allowed, upon the ground that the trustees were merely formal parties to the action. (79 N. C. Reps., 101.)

However, after the removal into the circuit court of the United States, upon motion the action was *remanded*, the learned judges expressing very briefly their opinion that "*the action in its present form cannot be maintained in this Court.*" Folio 55.

It is submitted that the present writ of error is invalid, upon two accounts:

1. Because the record should have been brought into this Court by appeal, and not by writ of error.

2. Because the action was not removable under the provision cited in the petition—the 3d clause of section 639; no other provision in the meantime (as said above) being applicable.

1. The proper process for bringing the record below into this Court was by *appeal.*

The action is by *cestuis que trusts* against trustees, and a purchaser from trustees. A bare statement of this fact indicates that upon its being removed into the circuit court of the United States the action was to be placed upon the equity docket. Whether all the relief asked for could be granted by that court might afterwards become a question, but *prima facie*, the action was by plaintiffs who, in the character which they asserted, had no place of standing in a court of law, *i. e.*, could raise no question there.

The North Carolina Code in order to carry out a constitutional provision (adopted in 1868) *abolishing* "the distinction between actions at law and suits in equity," and reducing all such to the single form of "a civil action," (Battle's

Digest, 137,) allows all actions to be prosecuted in the name of *the real party in interest.* (Ibid., p. 153, (55.)

However, *legal* and *equitable* estates continue to be distinguished in other respects as before.

In Matthews *vs.* McPherson, 65 N. C., 189, (A. D. 1871,) which was an action to recover possession of land, brought by a *cestuis que trust* against a vendee of the trustee, the supreme court said: "The distinction between actions at law and suits in equity as to the forms of procedure has been abolished in this State; but the distinction between legal and equitable rights still remains." And thereupon it went on to show why in the circumstances of that case the plaintiffs could not maintain their action.

The suggestions of the same court in the present case, 75 N. C. Repts., (above p. 1,) are to the same effect.

In Hurt *vs.* Hollingsworth, 100 U. S., 100, this court gives the rule (p. 103) which governs suits originally brought under codes, and transferred into courts of the United States: "A party who claims a legal title must, therefore, proceed at law; and a party *whose title or claim is an equitable one* must follow the forms and rules of equity proceedings as prescribed by this court."

That was a suit brought by one who had the legal title to certain lands, and demanded equitable relief, *i. e.*, the removal of a cloud thereon. Having originally been brought under the Texas Code, it was held that upon *removal* its proper place was the equity docket.

It appears by the judgment remanding this case (folio 50) that the attention of the plaintiffs in error was called expressly to the question whether they ought not to *appeal.*

2. The action was not removable under the 3d clause of section 639.

That clause, in its connection, is as follows:

SECTION 639. "Any suit commenced in any State court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed for trial into the circuit court for the district where such suit is pending, next to be held after the filing of the petition for such removal, hereinafter mentioned, in the cases and in the manner stated in this section."

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"*Third.* When a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed, on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition he makes and files in said State court an affidavit stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court."

I submit the following points:

(*a*) The supreme court of North Carolina were mistaken in holding that, under the above clause, it is competent to raise a question whether or not some of the parties on either side are merely *formal.*

(*b*) Considering the scope of the plaintiffs' action, and such scope (supposing no rule of pleading or practice to be violated) is for them alone to decide, the trustee defendants are necessary parties.

(*a*) The above clause does not warrant a question as to how many and who of the parties to a cause are merely *formal.*

In this case the State court assumed to say that so many of the defendants as are citizens of North Carolina are merely formal parties, and thereupon to hold that, for the purpose of removal, Myers alone is defendant. 79 N. C., 101, (above.)

For this they cite three cases in this Court:

1. Sewing-Machine Companies, 18 Wall., 553.

That was a case under the act of 1867, the wording of which differs materially from that of the above clause. The counsel who argued in favor of removal placed much of the stress of their argument upon the words which constitute that difference: They also put a case involving defendants some of whom should be merely *formal* parties. However, the court refused the removal asked for. I do not find anything in the opinion to countenance the view suggested in 79th North Carolina.

2. Vandever *vs.* Bryant, 21 Wall., 41.

This also was under the act of 1867, and there is nothing in the judgment or in the opinion that supports the view under consideration.

3. The only other case cited is that of Gardner *vs.* Brown, 21 Wall., 36.

This was under *the act of* 1866; and the application to remove was refused because the record disclosed no *controversy* to which the non-resident defendant was *sole* party.

This case, therefore, is not in point. As already said, the act of 1866 has been repealed, and at the time when the application in question was made the time had long passed for making it under the act of 1875.

I submit that it was an inadvertence upon the part of the learned North Carolina court to hold that the clause in question allowed of such inquiry and determination as that upon which their judgment was made to turn.

(*b*) Considering the scope of the plaintiffs' action, and that is the proper test to be applied, the citizens of North Carolina who are defendants, are necessary parties.

Under the North Carolina code the proceeding in one action for both title and possession, is competent; and it seems pertinent to call attention to the circumstance, that in the present case such union of remedies is due to a suggestion made by the supreme court of the State. It was therefore a thing done without by-ends, and in perfect good faith.

Unless by virtue of some positive statutory provision like that of the acts of 1866 and 1875, courts have no power to divide up actions which have been regularly brought.

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For Defendants in Error.